1-1-1989

Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising from Surrogacy

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WITHIN THE BEST INTERESTS OF THE CHILD: THE FACTOR OF PARENTAL STATUS IN CUSTODY DISPUTES ARISING FROM SURROGACY CONTRACTS

By Irma S. Russell

I. INTRODUCTION ...................................... 587
   A. The Surrogacy Controversy .................... 593
   B. The Future of Surrogacy ........................ 597
   C. The Best Interests Test ....................... 599
   D. Parental Status of Commissioning Party ..... 600

II. ESSENTIAL ELEMENTS OF SURROGACY ............ 606
   A. Genetic Link of Contract Father .............. 608
   B. Married Parents ................................ 611
   C. Infertility ..................................... 611
   D. Artificial Insemination ....................... 614
   E. Preconception Contract ....................... 615

III. THE BEST INTERESTS OF THE CHILD ............. 616
   A. Parental Preference ............................ 620
   B. Parental Status in Surrogacy ................. 627
   C. Focus: The Individual Child or Children in the Aggregate .................. 629

IV. THE CONTRACT ..................................... 631
   A. As Basis for Parental Status ................. 631
B. Limitations on Power of Contract .................. 632
C. The Judicial Role .................................. 635
   1. Termination of Parental Rights .............. 637
   2. Voluntariness of Termination .............. 637
   3. Creation of Parental Status by Contract ... 638
D. Comparison of Parties ........................... 639
E. The Contract as a Basis for Specific Performance 642

V. THE CONSTITUTION ............................... 643
   A. Basis for Contract Enforcement .............. 645
   B. Basis for Parental Status .................... 648

VI. PUBLIC POLICY CONSIDERATIONS ............... 653
   A. Comparison with Child Selling ............... 655
      1. Personal Services Contract .............. 656
      2. Legislative Intent of Child Selling Laws ... 657
         (a) Protection of Biological Parents ....... 660
         (b) Prevention of Exploitation of the Birth
             Mother .................................. 660
         (c) Protection of the Child ............... 663
   B. Comparison to Prebirth Consent to Adoption ... 665
   C. Commodification ................................ 667

VII. CONCLUSION .................................... 668
WITHIN THE BEST INTERESTS OF THE CHILD: THE FACTOR OF PARENTAL STATUS IN CUSTODY DISPUTES ARISING FROM SURROGACY CONTRACTS

By Irma S. Russell*

I. INTRODUCTION

The primary issue to be determined by this litigation is what are the best interests of a child until now called "Baby M." All other concerns raised by counsel constitute commentary.¹

The state court trial in *In re Baby "M"*² is the first case in this country that terminated parental rights of a mother and awarded custody of a child to the genetic father³ based on a surrogacy contract. In this much publicized case, the Superior Court of New Jersey's Chancery Division granted specific performance of the surrogacy contract, awarding custody of a baby girl, Melissa, to her genetic father, William Stern, and terminating the parental rights of the child's genetic mother, Mary Beth Whitehead-Gould. (Mrs. Whitehead-Gould will be referred to here as Mary Beth Whitehead, her name at the time of trial.) The trial court also based the termination of Ms. Whitehead's parental rights on specific performance of the contract through the court's *parens patriae* power.¹ In *In re Baby "M"*, 217 N.J. Super. 313, 323, 525 A.2d 1128, 1132 (Ch. Div. 1987), rev'd in part, 109 N.J. 396, 537 A.2d 1227 (1988) [hereinafter *Baby M*].

² *Id.* In this much publicized case, the Superior Court of New Jersey's Chancery Division granted specific performance of the surrogacy contract, awarding custody of a baby girl, Melissa, to her genetic father, William Stern, and terminating the parental rights of the child's genetic mother, Mary Beth Whitehead-Gould. (Mrs. Whitehead-Gould will be referred to here as Mary Beth Whitehead, her name at the time of trial.) The trial court also based the termination of Ms. Whitehead's parental rights on specific performance of the contract through the court's *parens patriae* power. *Id.* at 399, 525 A.2d at 1172.

³ *This article refers to the party seeking custody based on a surrogate agreement as the purchasing father, or simply as the commissioning party. The term "genetic father" is also used, although the genetic relationship does not appear to be essential to surrogacy. See infra Part II A. I have avoided the terms "sponsoring party" and "sponsoring husband," used elsewhere. See, e.g., Note, Litigation, Legislation, and Limelight: Obstacles to Commercial Surrogate Mother Arrangements, 72 IOWA L. REV. 415, 424 (1987) [hereinafter Note, Litigation], because they are unclear. The commissioning party is not sponsoring the child to join a club. Further, the party often referred to as a "father" could be of either gender. The commissioning party could be a career woman—or an unemployed woman—who desires to have another bear a child for her to raise. In the process of *in vitro* fertilization, an egg—which could be either that of the surrogate or the wife of the commissioning party or of some other woman—is removed from the body of a woman and fertilized with sperm in a petri dish. Thus, the surrogate could be genetically related.*

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* Visiting Assistant Professor, Cecil C. Humphreys School of Law, Memphis State University. I gratefully acknowledge the support of the law school generally, and particularly the faculty members who read and commented on the article, including Professor William P. Kratzke, Professor John C. Carter, and Professor Janet L. Richards. I also wish to thank Rachel H. Blumenfeld, Stephen C. Bush, Jerrilyn J. Ramsey, and David V. Smith, my research assistants on this project, and Journal editor Barbara Young for their valuable contributions to this work.


² *Id.*

³ *Id.*
contract with the child's mother. The Supreme Court of New Jersey


4 The type of contract involved in Baby M has become known as a "surrogate" or "surrogacy" contract or agreement. See In re Baby M, 109 N.J. 396, 410-11, 537 A.2d 1227, 1234 (1988)[hereinafter Baby M II]. In Baby M, the parties labeled the contract a "Surrogate Parenting Agreement." Id. at 472, 537 A.2d 1265, app. A. The procreative and parenting functions are bifurcated in surrogacy, allotting the procreative function to the inevitably female promisor and the parenting function to the typically male promisor and his wife. In the surrogacy contract, a woman agrees to conceive and bear a child for another. When her promise is made in exchange for a promise of payment, the arrangement is called a "commercial surrogacy." Surrogacy is frequently defined as an agreement between "a married couple which is unable to have a child because of the wife's sterility and a fertile woman who agrees to conceive the husband's child through artificial insemination. . . ." Black, Legal Problems of Surrogate Motherhood, 16 NEW ENG. L. REV. 373, 374 (1981); see also Katz, Surrogate Motherhood and the Baby-Selling Laws, 20 COLUM. J.L. & SOC. PROBS. 1, 2 (1986); Note, Surrogate Mothers: The Legal Issues, 7 AM. J. LAW & MED. 323 (1981). Although infertility in married partners now appears to be the typical impetus for surrogacy, it is by no means the only possible setting for the transaction. As the trial court noted in Baby M I, the factors recited in the above definition need not be present to constitute a surrogacy contract: "Use of a surrogate calls for the gestator to . . . relinquish all parental rights and give the child to its natural father who was, of course, the sperm donor. (In some variations of alternative reproduction even this basic assumption need not be so.)" Baby M I, 217 N.J. Super. at 333, 525 A.2d at 1137 (emphasis added). See also O'Brien, Commercial Conceptions: A Breeding Ground for Surrogacy, 65 N.C.L. REV. 127, 130-32 (1986); Note, Litigation, supra note 3, at 417-18; G. Corea, The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs 216-17 (1985); Wadlington, supra note 3, at 474-75.

5 The woman who promises to bear a child for another and relinquish parental rights is referred to as a "surrogate mother" or simply as a "surrogate." But as the New Jersey Supreme Court noted, this designation is inappropriate. Baby M II, 109 N.J. at 411, 537 A.2d at 1234. "Surrogate" is a misnomer because the woman who bears the child pursuant to a contract is not a fake or substitute mother. She is the biological and, typically, the genetic mother of the child. See Robertson, Surrogate Mothers: Not So Novel After All, HASTINGS CENTER REPORT 28 (Oct. 1983) [hereinafter Robertson, Surrogate Mothers]. ("[I]t is the adoptive mother who is the surrogate mother for the child since she parents a child borne by another.") In her book, The Mother Machine, Gena Corea described the women who promise to bear a child for the purpose of relinquishing it to another as "breeders." G. Corea, supra note 4, passim. Although this term may be a more accurate description, this writer rejects it as demeaning to women and employs the term "surrogate" because of its widespread use.

Through the use of in vitro fertilization (IVF), it is possible for a woman to give birth to a child that is genetically unrelated to her. See Annas & Elias, supra note 3, at 199 n.1; Comment, supra note 3, at 231-32. Even in such a case, "surrogate" may be a misleading term since the birth mother is the biological—though not the genetic—mother of the child she has borne. See Annas & Elias, supra note 3, at 222. But see Note, Reproductive Technology and the Procreation Rights of the Unmarried 98 HARV. L. REV. 669, 674 n.29 (1985)(suggesting that the assumption of parental status for the surrogate may be defeated—when she is not genetically related to the child); Comment, supra note 3, at 232 and passim (using the term "IVF carrier" to describe the woman who enters this arrangement and arguing that it presents a stronger case for preserving the
reversed this decision, however, on the grounds that (1) commercial surrogacy is "illegal, perhaps criminal, and potentially degrading to women,"\(^6\) and (2) the irrevocable surrender of custody of a child prior to birth is contrary to public policy.\(^7\) Likewise, in *Yates v. Keane*, a Michigan court held that surrogacy for compensation is illegal\(^8\) and reaffirmed that state's rejection of commercial surrogacy.\(^9\) Moreover, some states have recently enacted legislation providing that surrogacy contracts violate public policy.\(^10\) Other states deal with surrogacy

interests of the commissioning party). For a thorough outline of the possible combinations of methods of artificial conception, see Wadlington, *supra* note 3, at 488-96.

\(^6\) The supreme court's literal statement is that the "payment of money to a 'surrogate' mother [is] illegal . . . ." *Baby M II*, 109 N.J. at 411, 537 A.2d at 1234 (emphasis added). The opinion leaves no doubt, however, that the entire contract is invalid not merely the act of paying money. *See id.* at 462, 537 A.2d at 1261 ("[T]he surrogacy contract is unenforceable and illegal."). Specifically, the court invalidated the surrogacy contract, the termination of Mary Beth Whitehead's parental rights, and the adoption by Mrs. Stern. But despite its rejection of the surrogacy contract, the supreme court substantially affirmed the trial court's award of custody to the commissioning father. *Id.* at 411, 537 A.2d 1235. "Under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child." *Id.* at 437, 537 A.2d at 1248.

\(^7\) *Yates v. Keane*, Mich. Cir. Ct. Gratiot Cty., Nos. 9758 & 9772, 1/21/87 [14 Fam. L. Rptr. 1160 (1988)]. In *Yates*, as in *Baby M*, the court afforded the genetic father status as a natural parent and decided the question of custody as a typical custody dispute between parents. See *Yates v. Keane*, Mich. Cir. Ct. Gratiot Cty., Nos. 9758 & 9772, 1/21/87 [14 Fam. L. Rptr. 1161 (1988)]. The tendency of courts to treat custody disputes involving children born of alternative reproductive methods like custody disputes in divorce has been discussed in the context of use of artificial insemination by donor (AID) by lesbian women. See O'Rourke, *Family Law in a Brave New World: Private Ordering of Parental Rights and Responsibilities for Donor Insemination*, 1 BERKELEY WOMEN'S L.J. 140 (1985). In this article, Ms. O'Rourke notes that in a California case, J.C. v. M.K. (*Id.* at 141 (cite withheld to protect confidentially of parties)), a man secured visitation rights and was declared the legal father of a child produced as a result of his semen donated to a lesbian who wished to bear and raise a child.

[T]he decision of who should be the legal parents of the child was left to the discretion of a family court judge. The parties' use of an alternative method of reproduction and their intention to create an alternative family by choice were not recognized by the trial court. Instead, the judge treated the case as if it were an ordinary custody dispute between a divorcing couple who had conceived their child through their marital relationship.

*Id.* at 142.


LA. STAT. ANN. § 9:2713 (West 1987), which became effective September 1, 1987, provides *in toto:*

**Contract for surrogate motherhood: nullity.**

A. A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy.

B. "Contract for surrogate motherhood" means any agreement whereby a person not married to the contributor of the sperm agrees for valuable consideration to be insemi-
Many other state legislatures are currently considering bills

notated, to carry any resulting fetus to birth, and then to relinquish to the contributor of
the sperm the custody and all rights and obligations to the child.

The literal language of this provision includes neither artificial insemination by donor (AID) when
a person other than the commissioning party donates the sperm nor use of a surrogate to carry a
child resulting from fertilization outside her body (by in vitro fertilization). The purpose of the
statutory prohibition seems to include such variations on the typical surrogacy technique, however.

No justification exists for preferring contracts for the creation of children unrelated to the commis-
sioning party. Indeed, the genetic link often found in the surrogacy setting has been offered as a
factor that distinguishes surrogacy from baby selling. See, e.g., Black, supra note 4, at 382. It
seems unlikely that the Louisiana legislature intended to nullify surrogacy contracts in which the
commissioning party is the genetic father of the child while allowing such contracts when the
sperm of someone other than the commissioning party is used. Similarly, fertilization of the
egg—either that of the surrogate or that of another—outside the surrogate’s body does not allevi-
ate the danger at issue. The effect of invalidation of the contract is unclear in the Louisiana
statute. Probably, legislative nullification of contract will have the same effect as judicial nullifica-
tion had in Baby M: The genetic father of the child born as a result of surrogacy can seek custody
of the child based on a comparison of himself and the surrogate. Further, the surrogate may have
no ground for asking a court to compare her with the genetic commissioning father if she submit-
ted to an in vitro process in which her egg was not used.

The Indiana statute defines surrogacy agreements more broadly than does Louisiana; it in-
cludes agreements where the child to be produced is genetically related or unrelated to the surro-
gate. The Indiana statute declares that “a court may not base a decision concerning the best
interest of a child” solely on evidence that the child was produced pursuant to the surrogate
contract unless the contract was the result of duress, fraud, or misrepresentation.

Michigan’s legislation makes commercial surrogacy a crime and prohibits intermediaries
into effect in September of 1988, punishes brokering of surrogacy contracts as a felony, subject to
up to five years imprisonment and a $50,000 fine. It also provides for misdemeanor penalties for
those who contract to bear a child for money, setting a misdemeanor penalty of up to 90 days in
jail and a fine of up to $10,000 as the punishment for this offense. See Paid Surrogacy Banned,

11 See, e.g., TENN. CODE ANN. § 36-1-114 (1986). The Tennessee statute requires that sur-
render of a child by its parent to another party for adoption be made in the presence of a judge in
chambers. The judge must privately interview the surrendering parent, asking whether the parent
has paid or received any money or other remuneration in connection with the birth of the child or
placement of the child for adoption, and if so, to or from whom, the specific amount, and the
purpose for which it was paid or received. The statute expressly exempts payment of fees to a
surrogate as a basis for denying an adoption. “[I]f consideration is given in the case of a surrogat
birth, such consideration, or the amount thereof, shall not be used to deny the adoption.” Id.
(emphasis added)(some exceptions to the requirement not relevant here are included in the stat-
ute). The Tennessee Department of Human Services sponsored the bill that was codified as § 36-
1-114. According to attorney Louise Fontecchio, general counsel of the Department at the time
the bill was passed, the Department had no intention of approving surrogacy by this bill. The
purpose of the bill containing this provision was to make clear that attorneys could not charge a
fee other than the customary fee for actual legal services rendered for facilitating an adoption of a
child. The proviso on surrogacy was offered as an amendment in committee hearing by a senator
not on the committee with the stated purpose of clarifying that the bill in no way addressed surrog-
agy.

See also N.J. STAT. ANN. § 9:17-44 (West 1986)(The New Jersey statute apparently recog-
nizes the legal status of a man who provides semen for artificial insemination pursuant to a writ-
that would either reject or regulate surrogacy.¹⁸

These judicial and legislative decisions do not spell the end of commercial surrogacy in the United States.¹⁸ States that have not invalidated the practice of surrogacy will face the question of the enforceability of such contracts. All states will decide custody disputes involving children born as a result of surrogacy. Custody disputes will inevitably arise even in states, like New Jersey and Indiana, that have invalidated commercial surrogacy.¹⁴

The opinions of both the trial court and the New Jersey Supreme Court in Baby M present a valuable exploration of two bases for awarding custody of a child born of surrogacy: contract rights and parental status. The opinions provide a testing ground for the policy choices that courts and legislatures will make in deciding the future of surrogacy in this country.¹⁸ The two opinions in Baby M represent the

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¹⁸ In 1987, 27 states and the District of Columbia considered bills dealing with surrogacy. See Adams, An Examination of Bill Introductions During the 1987 Legislative Session Relating to Surrogacy Contracts, 13 (2) State Legislative Report 1 (Jan. 1988).

¹⁷ Several states are currently considering legislation that would regulate surrogacy. See, e.g., Nev. Sen. Bill No. 272. The Nevada bill would exclude surrogate births from the prohibition against payment to a natural parent in return for placement of a child for adoption. The bill treats a release or consent to adoption given prior to birth or within 72 hours of birth as invalid—whether given in the case of surrogacy or adoptions. The opinion of the New Jersey Supreme Court in Baby M II acknowledged the possibility of future surrogacy arrangements in that state. The opinion acknowledges the possibility of legislative empowerment of surrogacy arrangements. See Baby M II, 109 N.J. at 452-53, 537 A.2d at 1255 n.16. Moreover, by prohibiting ex parte orders to transfer custody to the commissioning party absent proven unfitness of the surrogate, the supreme court acknowledged that surrogacy may continue despite the court's rejection of judicial enforcement. Id. at 462-63, 537 A.2d at 1261.

¹⁴ These disputes are likely to arise in two contexts: (1) contracts entered outside the jurisdiction that has invalidated surrogacy; and (2) contracts entered by residents of a state that has invalidated surrogacy. The disputes arising under the first category will present conflict of law problems regarding whether the state that has disaffirmed the practice must enforce contracts entered into in other states. In the second category, courts will face the issue presented in Baby M. The only difference will be that parties entering surrogacy agreements after judicial or legislative declaration of the invalidity of the contract have notice of the invalidity of the contract.

¹⁸ The New Jersey Supreme Court noted that Baby M will "highlight many [of surrogacy's] potential harms" for the consideration of state legislatures. See Baby M II, 109 N.J. at 469, 537 A.2d at 1264. Whether the legality of surrogacy contracts will be the subject of federal legislation or federal oversight by use of doctrines such as the full faith and credit clause is an open question. For a general discussion of the best interests standard in child custody cases, see Case Comment, Ford v. Ford: Full Faith and Credit to Child Custody Decrees? 73 YALE L.J. 134, 140-42 (1963).
extremes in reactions to surrogacy. The trial court regarded surrogacy as a valuable option for obtaining children.\(^{16}\) It empathized with the commissioning father's anguish at the prospect of being childless or losing the child\(^{17}\) and refused to attach any significance to the surrogate's loss of the child.\(^{18}\) By contrast, the New Jersey Supreme Court rejected surrogacy, holding the contract invalid and unenforceable because of the public policy against commercial transactions in children.\(^{19}\) Although the supreme court rejected the contract basis for enforcement of the surrogate parenting agreement, it accepted without inquiry the status of William Stern as "natural parent" of the child born as a result of the contract. Finally, the court assumed that public policy considerations have no role in determining who is a natural parent. This Article explores the significance of parental status in the determination of custody and the question of whether the legal relationship of parent

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Emphasizing the absence of any "right answer," this comment concludes that

\(^{16}\) The resolution of these policy conflicts seems preeminently suited for the kind of state experimentation essential to the functioning of the federal system; the Court would be misconceiving its role as arbiter of the federal system if it attempted to resolve these controversies by using the full faith and credit clause to promote those procedures of which it approves.

\(^{17}\) The sole legal concepts that control are \textit{parens patriae} and best interests of the child.

\(^{18}\) To wait for birth, to plan, pray and dream of the joy it will bring and then be told that the child will not come home, that a new set of rules applies and to ask a court to approve such a result deeply offends the conscience of this court.

\(^{19}\) "Enforcing the contract will leave Mr. and Mrs. Whitehead in the same position that they were in when the contract was made." \textit{Id.} at 398, 525 A.2d at 1170. Similar selectivity in judging what interests are worthy of protection under the rubric of the right to procreate appears in scholarship in this area. \textit{See}, \textit{e.g.}, Robertson, Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth, 69 \textit{Va. L. Rev.} 405 (1983)\cite{Robertson} [hereinafter Robertson, Procreative Liberty]. Professor Robertson argues that the decision to use available means of reproduction can be limited only when the government has a compelling state interest, but that a woman's interest in making decisions related to the process of birth is not entitled to protection. \textit{Id.} at 433, 451, and \textit{passim}.

\(^{10}\) \textit{See Baby M II}, 109 N.J. at 411, 462, 537 A.2d at 1234, 1261.
and child is also subject to public policy limitations.

A. The Surrogacy Controversy

Surrogacy is one of the most hotly contested questions of our time. The ramifications of the answer our courts and legislatures reach may affect personal and economic liberty in unforeseen ways. The answer will profoundly affect the way our society views the relationship between parent and child and, consequently, the reality of the relationship between parents and children of the future and the power of the state to regulate that relationship.

The primary policy argument favoring commercial surrogacy is that the practice provides a means of alleviating infertility, thereby meeting the needs of infertile married couples. Surrogacy is analogized to medical technologies that allow infertile couples to bear chil-

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20 The issue of surrogacy requires re-evaluation of principles of contract and constitutional law (including the prohibitions against prebirth adoption contracts and baby selling), the rule refusing enforcement of contracts for custody of children, and the right of women to decide whether or not to bear a child.

21 Many who favor surrogacy also assert, however, that infertility in the commissioning couple or individual should not be required for an enforceable surrogate contract. See, e.g., Robertson, Procreative Liberty, supra note 18, at 418-20. Indeed, even if courts purported to limit the use of surrogates to infertile couples, they would have difficulty ascertaining whether infertility was the true motivation for the surrogacy arrangement.

22 The trial court in Baby M I noted that:

An estimated 10% to 15% of all married couples are involuntarily childless. This calculation represents a three-fold increase of childless married couples over the last 20 years. It is estimated that between five-hundred thousand and one million married women are unable to have a child related to them genetically or gestationally without some kind of assisted fertilization or uterine implant.

Baby M I, 217 N.J. Super. at 331-32, 525 A.2d at 1136 (citing National Center for Health Statistics, Vital and Health Statistics (December 1982) § 23 no. 11 at 13-16, 32). The epidemic of infertility stands in stark contrast to the claim that medical advances have brought us to a new position of procreative control. "[S]cientific understanding of the reproductive process now allows greater control over many aspects of reproduction." Robertson, Procreative Liberty, supra note 18, at 407. Some commentators charge that to a significant extent, infertility is a result of medical practices. See, e.g., G. Corea, supra note 4, at 146-48, 160-62. Other reasons given for the rise in infertility include the frequent decision to delay childbearing until after education and initial career goals are attained and to the increase in sexually transmitted diseases. See Baby M I, 217 N.J. Super. at 332, 525 A.2d at 1137 (discussing reasons for "dearth of adoptable children").

In Baby M II the supreme court noted that if the infertility crisis is as dramatic as represented, the need to perpetuate may present a compelling state interest sufficient to justify the use of surrogacy. Baby M II, 109 N.J. at 452-53 n.16, 537 A.2d at 1255-56 n.16. One recent study indicates that infertility may not be increasing but, in fact, declining slightly. See Costs High, Births Low for Infertile, Memphis Commercial Appeal, May 18, 1988 at A12.
Those who oppose commercial surrogacy, however, argue that it is a form of baby selling, that it commercializes a fundamentally personal relationship, and that it exploits the individuals it appears to serve. Is the surrogate contract a medical triumph over infertility and inconvenience, which allows the exercise of the fundamental right to procreate and raise a family free from demands of childbirth? Or is it a contract for the sale of a child, albeit one that is produced expressly for and often genetically related to the purchaser?

If courts and legislatures view surrogacy as a reasonable medical alternative for those unable or unwilling to bear children, then judicial enforcement will follow. But if they conclude that the arrangement is

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23 Proponents lump surrogacy with other collaborative reproduction processes such as artificial insemination by donor (AID), in vitro fertilization (IVF), and embryo transfer (ET). "Surrogate motherhood . . . illustrates the legal and ethical issues arising in collaborative reproduction generally." Robertson, Surrogate Mothers, supra note 5, at 28. Robertson's conclusion is that surrogacy "is barely distinguishable from the many current practices that separate biologic and social parentage and that seek parenthood for personal satisfaction." Id. at 34. While these processes involve controversies, they are not the same controversy presented in surrogacy. See Annas & Elias, supra note 3, at 208-15. The controversial aspect of IVF and ET is the status of the embryo. Legal questions surrounding IVF and ET center on the discard of "excess" embryos and the abortion of unwanted fetuses. By contrast, the issues involved in surrogacy are the sale of children and the rights of parents to the companionship of their children. Lumping the various techniques together clouds the issue and aids proponents of surrogacy by associating it with non-controversial treatments for infertility. Annas and Elias distinguish surrogacy from IVF and ET, rejecting the practice of surrogacy because of the danger of commercialization. "The experience of surrogate childbearers in the United States to date (using AID, not IVF) strongly suggests that this method of procreation should be discouraged by medical and legal practitioners alike." Id. at 217. Unlike the other medical strategies mentioned, surrogacy transfers the burden of gestation outside the family that intends to raise the child.

24 The supreme court offered one insight on the potential consequences of surrogacy: "It is expecting something well beyond normal human capabilities to suggest that this mother should have parted with her newly born infant without a struggle. Other than survival, what stronger force is there?" Baby M II, 109 N.J. at 459, 537 A.2d at 1259.

25 Surrogate birth is not a new development in medical technology. Since the 1920s artificial insemination has been used widely in animal husbandry in this country. Increased infertility rates may be the reason our society now requires a judicial solution to the question of whether surrogacy contracts should be enforced. See Baby M I, 217 N.J. Super. at 331, 525 A.2d at 1228, 1136. But see United States Congress, Office of Technology Assessment, Infertility: Medical and Social Choices, 5 (1988)[hereinafter Infertility]. The need for a decision may rest on the new acceptance by parties involved in such contracts of the analogy of this technique to other medical techniques such as AID, IVF, and ET.

26 Such enforcement may be either the contract enforcement granted by the trial court in Baby M I or the more limited right to be compared with the surrogate in a custody dispute. This interest is stated most convincingly in the case of infertile couples. The constitutional guarantee of equal protection will make difficult, however, any line between those unable and simply unwilling to produce children without the aid of a surrogate. See Part II of this Article for a discussion of problems associated with limitations on the use of surrogacy to the infertile.
in substance the sale of a child, they will discourage such contracts. Surrogacy has been the subject of numerous articles in legal and popular periodicals. Many legal commentators have heralded surrogacy optimistically and uncritically. The trial court in Baby M and numerous legal commentators maintain not only that surrogacy agreements should be recognized as legal, but also that they should be enforceable by specific performance of the surrogate's promise to relinquish custody and parental rights in the child. Other commentators have noted problems inherent in surrogacy or have expressed reservations about the use of specific enforcement to compel the surrogate to relinquish the child. To date, no commentator has endorsed specific performance

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27 A review of the Index of Legal Periodicals revealed that since the early 1980s the number of published articles dealing with surrogacy has steadily increased. The number of articles listed each year is as follows: 1983—three articles, 1984—six articles, 1985—seven articles, 1986—eight articles, and 1987—fifteen articles.

28 "Despite the simplicity of the arrangement and its advantages for all concerned surrogate motherhood is fraught with legal difficulties." Black, supra note 4, at 374 (emphasis added). See also Keane, Legal Problems of Surrogate Motherhood, 1980 S. ILL. U.L.J. 147, 148; Hollinger, From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction, 18 J.L. REFORM 865, 869 (Summer 1985)(asserting that "federal and state governments should encourage the procreative efforts of childless couples and remain neutral among couples making different choices. This neutrality implies a presumptive deference to voluntary private agreements and a reluctance to dictate their terms."). See also Baby M I, 217 N.J. Super. at 373, 525 A.2d at 1158:

The fifth argument against surrogacy is that it will undermine traditional notions of family. How can that be when the childless husband and wife so very much want a child? They seek to make a family, They intend to have a family. The surrogate mother could not make a valid contract without her husband's consent to her act. This statement should not be construed as antifeminist. It means that if the surrogate is married, her husband will, in all probability, have to sign the contract to establish his nonparental status pursuant to the New Jersey Parentage Law. Both sides of the equation must agree. But see Krause, Artificial Conception: Legislative Approaches, 19 FAM. L.Q. 185, 200 (Fall 1985)("I would prefer to see commercial surrogate motherhood being declared illegal. . . . If the practice is illegal, any surrogacy agreement would of course be automatically unenforceable.")(emphasis in original).


30 In reviewing the book The Baby Makers by Diana Frank and Marta Vogel, Sue M. Halpern noted: "While the prohibitive costs of many of the new reproductive technologies means they are almost exclusively available to the affluent, the real financial issue is more inclusive. Should research funds and time be committed to solving a problem that may be more about vanity than illness?" New York Times Book Review, Mar. 27, 1988, at 35.

31 See Coleman, Surrogate Motherhood: Analysis of the Problems and Suggestions for So-
of the other promises necessary to surrogacy, such as the promise to submit to insemination, to carry and deliver the child, and to forbear terminating the pregnancy.\(^8\)

Proponents of surrogacy seek to distinguish surrogacy from baby selling\(^8\) and adoption\(^4\) on the bases that a surrogacy contract is entered before conception and the contract father is often genetically re-

\(^8\) See also Greenberg & Hirsh, Surrogate Motherhood and Artificial Insemination: Contractual Implications, 1983 Med. Trial Tech. Q. 149, 155; Katz, supra note 4, at I. Coleman, supra note 31, at 71. Proponents also argue that the contract father is not purchasing a child but rather is arranging with the surrogate to carry his child. See Note, The Surrogate Child: Legal Issues and Implications for the Future, 7 J. Juv. L. 80, 83 (1983)[hereinafter Note, Surrogate Child].

\(^4\) Note, Modern Family, supra note 29, at 1292: In the usual voluntary termination of parental rights and responsibilities scenario, a pregnant woman decides to surrender her child for adoption by unrelated parties. Often the woman is unmarried or under some other social or economic pressure that makes her vulnerable to exploitation and impairs her judgment. . . . In a surrogate parenthood arrangement, these conditions do not exist. . . . [T]raditional legal thinking about termination of parental rights and responsibilities does not apply to surrogate parenthood arrangements.

See also Note, Surrogate Child, supra note 33, at 80; Note, Surrogate Mother, supra note 29, at 807; Note, The Rights of the Biological Father: From Adoption and Custody to Surrogate Motherhood, 12 Vt. L. Rev. 87 (1987)[hereinafter Note, Biological Father].
lated to the child.\textsuperscript{86} They maintain that these facts justify a special rule to accommodate the needs of the contracting father or couple. Current scholarship on this issue fails to explore adequately the policies that inform the prohibitions against baby selling and prebirth consent to adoption. Courts and commentators assume that such laws are motivated by a desire to protect children and society against the commercialization of children and mothers.\textsuperscript{86} If indeed this is a valid public policy objective, the lawfulness or enforceability of surrogacy contracts can be determined only after examining whether the practice impermissibly commercializes the child produced or the surrogate mother.

\textbf{B. The Future of Surrogacy}

Despite the New Jersey Supreme Court’s emphatic rejection of surrogacy, the rights of parties to surrogacy agreements are far from settled in New Jersey. The New Jersey Supreme Court stated that its decision in \textit{Baby M} would deter surrogacy.\textsuperscript{87} But the strength of the deterrence is unclear. In New Jersey a surrogate mother is now unable to enforce the payment provisions of the contract,\textsuperscript{88} and the purchasing\textsuperscript{89} party is unable to obtain specific enforcement of the promise to

\textsuperscript{86} See Note, Surrogate Child, supra note 33, at 83.

\textsuperscript{88} See Katz, Surrogate Motherhood and Baby Selling Laws, 20 COLUM. L.J. 1, 17 (1986)("The fundamental public policy that human beings are not property and therefore are not to be bought and sold underlies the baby-broker acts."). \textit{See also Baby M II}, 109 N.J. at 439-41, 537 A.2d at 1249-50. "Whatever idealism may have motivated any of the participants, the profit motive predominates, permeates, and ultimately governs the transaction." \textit{Id.} at 439, 537 A.2d at 1249. \textit{See also} Landes & Posner, \textit{The Economics of the Baby Shortage}, 7 J. LEGAL STUD. 323, 336 (1978); Coleman, \textit{Surrogate Parenting: A Quagmire of Legal Issues}, 39 VAND. L. REV. 597, 641-43 (1986)(distinguishing surrogacy from child bartering).

\textsuperscript{87} See \textit{Baby M II}, 109 N.J. at 454, 537 A.2d at 1257 ("Our declaration that this surrogacy contract is unenforceable and illegal is sufficient to deter similar agreements.").

\textsuperscript{89} Removal of the profit incentive clearly will discourage some women who might otherwise serve as surrogates. Proponents and critics alike agree that few women will undertake surrogacy without compensation. \textit{See, e.g.}, Parker, \textit{Motivation of Surrogate Mothers: Initial Findings}, 140 AM. J. PSYCHIATRY 117, 118 (1983)(89% of the women studied said a fee was necessary); Keane & Breo, \textit{supra} note 29 at 268-69, 311; Annas & Elias, \textit{supra} note 3, at 221; Note, \textit{Litigation}, \textit{supra} note 3, at 433.

\textsuperscript{86} Both proponents and opponents of surrogacy agree that commercial surrogacy involves a purchase. The dispute of surrogacy centers on what is purchased, not on whether a purchase occurs. Proponents maintain that commercial surrogacy involves the sale of gestational services. \textit{See} Black, \textit{supra} note 4, at 384; Robertson, \textit{Surrogate Mothers}, \textit{supra} note 5, at 33. Robertson dismisses the objections to payment as “moral distaste,” and concludes such an objection is insufficient to justify interference with a fundamental right. \textit{Id.} Robertson rejects the distinction between purchasing services or a child: “It is quibbling to question whether the couple is ‘buying’ a child or the mother’s personal services. Quite clearly, the couple is buying the right to rear a child by paying the mother to beget and bear one for that very purpose.” \textit{Id.} Opponents of surrogacy
relinquish the child. Additionally, some who might otherwise consider surrogacy (either as a provider or as a purchaser) will now reject it because of judicial disapproval. Others, however, will be desperate enough—either for a child or for the money—to enter a surrogacy contract despite its illegality.

The holding of the New Jersey Supreme Court produces different effects on the two parties to the illegal contract. The inability to enforce the payment provision of the contract is clear. No exception or qualification exists to allow recovery of the payment promised. However, the effect of illegality on the commissioning party is less clear. The commissioning father in both *Yates* and *Baby M* secured primary custody of the child. But a court could grant primary or sole custody to the surrogate mother, finding her to be the better custodial parent. Or the court could grant the commissioning father only shared custody with the surrogate as occurred in these early cases. These are risks the commissioning party may not wish to assume.

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view the purchase as a purchase of a child. *See, e.g.,* Annas & Elias, *supra* note 3, at 221 (“[E]ven though services are part of what is being purchased, what is really wanted, and for all practical purposes what is principally being purchased is a child.”). The New Jersey Supreme Court agreed that surrogacy involves an impermissible purchase—either of a child or of the relinquishment of parental rights. *Baby M II*, 109 N.J. at 437-38, 537 A.2d at 1248.

40 One can argue that those who enter a surrogacy contract after its illegality has been established have compromised their claim to fitness as parents to a greater extent than did either William Stern or Mary Beth Whitehead who contracted prior to the judicial declaration of its illegality. On the other hand, the New Jersey Supreme Court committed itself to the goal of furthering the child's interests over any other goal. Hence, under this rationale if the commissioning party compares favorably with the surrogate, he or she should prevail in a custody dispute with the surrogate despite the clear illegality of the transactions.

41 In *Baby M II*, the supreme court rejected the surrogate's right to payment. Because the surrogacy contract was held illegal, an action based on other theories such as *quantum meruit* or promissory reliance probably would also fail. Both promissory reliance and restitution (*quantum meruit* for personal services in this context) are awarded only in circumstances that would create injustice if no recovery is had. *See Restatement (Second) of Contracts* § 90 (1979). Restitution is generally unavailable as compensation for services contracts that are unenforceable on grounds of public policy. *See id.,* ch. 8, Topic 5 introductory note.

42 The court modified the grant of custody to William Stern by an order that, on remand, the superior court determine visitation rights of Mary Beth Whitehead. *Baby M II*, 109 N.J. at 463-67, 537 A.2d at 1261-63. The superior court granted Mrs. Whitehead a right to weekly visitation with Melissa of eight hours. The visitation schedule will increase to two days every other week starting in September 1988 and after one year will include overnight visits. Beginning in the summer of 1989, Mrs. Whitehead will be allowed two weeks summer visitation with Melissa. *Baby M*, 14 Fam. L. Rep. (BNA) 1276. *See Yates v. Keene*, Mich. Cir. Ct. Gratiot City, nos. 9758, 9772 (Jan. 27, 1987)[14 Fam. L. Rep. 1160 (1988)].

43 The New Jersey Supreme Court attempted to control the balance of power between surrogate and purchaser by disapproving transfer of any child born to a surrogate pending outcome of a custody trial:
C. The Best Interests Test

The courts in Baby M disagreed dramatically about the validity of surrogacy contracts. Nevertheless, each court found the "best interests of the child" to be the controlling issue. In the introductory paragraph of Baby M (quoted at the beginning of this article), the trial court relegated to dicta its contract and constitutional findings and adopted the best interests of the child as the "only rule" by which it could be guided.44 Although the New Jersey Supreme Court disagreed with the trial court's determination of the public policy of the state, it agreed that the best interests of the child controlled.45

Any application by the natural father in a surrogacy dispute for custody pending the outcome of the litigation will henceforth require proof of unfitness, of danger to the child, or the like, of so high a quality and persuasiveness as to make it unlikely that such application will succeed. Absent the required showing, all that a court should do is list the matter for argument on notice to the mother. Even her threats to flee should not suffice to warrant any other relief unless her unfitness is clearly shown. At most, it should result in an order enjoining such flight.

Baby M II, 109 N.J. at 462-63, 537 A.2d at 1261. Continued custody in the surrogate mother pending the litigation will affect the determination of best interests of the child. If trial courts observe this rule, the proven "track record," see id. at 458, 537 A.2d at 1259, of successful custody in the commissioning party's home will not be available as support for the commissioning party's claim of best interests. Continuation of custody is not, however, necessarily the crucial factor in the custody determination. In Baby M II, for example, the supreme court did not suggest that if Mary Beth Whitehead had been able to retain custody during the litigation, the child's best interests would have required a grant of custody to Mrs. Whitehead.

In Yates and Baby M, what the commissioning party secured by virtue of the surrogacy arrangement was the right to be compared by a court with the surrogate mother. (In these cases this benefit was secured without any payment to the surrogate since the courts invalidated the payment provisions of the contracts.) Accordingly, anyone who would obtain a child through surrogacy in these states maximizes his chance of success by hiring a surrogate who would likely be found to be an unfit parent. Such an attribute clearly compromises the best interests of the child to be born while it enhances the commissioning party's chance of parenthood. Does this mean that women previously held to be unfit parents will be in demand as surrogates?

44 This court held that whether there will be specific performance of this surrogacy contract depends on whether doing so is in the child's best interest. . . . Any other result would indeed conflict with the court's role as parens patriae. Thus, in the absence of a public policy regarding surrogacy in New Jersey, with the rule as aforesaid that the laws of adoption, custody and parental termination were never intended to apply and do not apply to surrogacy, the only rule of law by which this court may be guided is the application of the doctrine of the child's best interests in the exercise of its parens patriae jurisdiction.

Baby M I, 217 N.J. Super. at 390, 525 A.2d at 1166-67 (emphasis added).

45 "Under the Parentage Act the claims of the natural father and the natural mother are entitled to equal weight, i.e., one is not preferred over the other solely because he or she is the father or the mother. N.J.S.A. 9:17-40. The applicable rule given these circumstances is clear: the child's best interests determine custody." Baby M II, 109 N.J. at 453, 537 A.2d at 1256 (citing N.J. Stat. Ann. § 9:17-40 (West 1988)). The supreme court noted that the trial court's approach...
Both courts accepted the parental status of the contract father without scrutiny of the contractual basis for that status. Accordingly, both decisions elevate contractual interests above the best interests of the child in the sense this concept has been traditionally applied to protect children in various contexts, including adoption and the sale of children. Judicial acceptance of the parental status of the commissioning parent achieves in some measure the purpose of this illegal contract. It gives the commissioning party rights with regard to the child and treats the commissioning party like a parent who has produced a child through a personal, rather than commercial, relationship. Classifying the commissioning party as a parent when he is the genetic father may result in the same classification for commissioning parties who are not related to the child. Because of the contract and the classification as "natural parent," the father can demand to be compared with the biological mother in a custody dispute.

D. Parental Status of Commissioning Party

The parental status of the litigants affects profoundly the custody determination of the best interests of the child. Courts have long held that primary custody should be granted to the parent who would best serve the interests of the child, and that when the parent's and child's interests conflict, the child's interests must prevail. Courts and scholars also agree, however, that these principles should not operate to remove a child from a fit parent merely to enhance the child's life chances. Hence, in the absence of a finding of unfitness of the surrogate, an award of custody to the commissioning party in a surrogacy arrange-

to the best interests question was "substantially indistinguishable" from its own approach but was used to determine contractual remedies. Id.

46 This is not to suggest that the supreme court accepted Mr. Stern's parenthood inadvertently or without recognition of the influence of the contract on its determination of parental status. On a related question, the custody determination itself, the court noted the distinction between giving effect to a contract and considering the existence of the contract as a circumstance. 

"[W]e now must decide the custody question without regard to the provisions of the surrogacy contract that would give Mr. Stern sole and permanent custody. (That does not mean that the existence of the contract and the circumstances under which it was entered may not be considered to the extent deemed relevant to the child's best interests.)" Id.

47 The supreme court made clear that the contract served the interests of the parties, not those of the child. Id. at 413-14, 418, 537 A.2d at 1236, 1238. "Worst of all, however, is the contract's total disregard of the best interests of the child." Id. at 437, 537 A.2d at 1248.

48 See Part III of this Article.

ment must be based on acceptance of the parental status of that party.

Although the New Jersey Supreme Court rejected in principle any contract right to custody of a child, it accepted two concepts necessary to surrogacy: (1) the parental status of the commissioning party and (2) the consequent use of the best interests test as a comparison of the two litigants competing for custody of the child. Because the court accepted these two concepts, its analysis preserved to a significant extent the rights and expectations of the commissioning party, which the trial court protected as a matter of contract law. It is doubtful that the supreme court would have granted primary custody to William Stern if it had deemed him a nonparent. Although both courts stated that the interests of the child prevail, both rulings respected and effectuated the contract to a great extent, even to the extent of subjugating the best interests of children generally to the contractual interests presented.

The New Jersey Supreme Court clarified that contract rights, including contractual extinguishment of parental rights, depend on a public policy judgment. But neither court discussed or acknowledged that creation of parental status also derives from a public policy decision. The judgment of what persons are preferred custodians is a public policy decision traditionally fixed by reference to the status of the litigants as well as the interests of the child involved.

To the extent that the constitution requires the recognition of parental rights, neither courts nor legislatures may restrict those rights.

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50 Although the court stated that its holding of illegality is "sufficient to deter" future surrogacy, its instructions concerning custody of the child who is the subject of a dispute pending a custody trial are evidence that the court recognized that surrogacy will continue in New Jersey. See Baby M II, 109 N.J. at 462-63, 537 A.2d at 1261.

51 One might assume that the contest between Elizabeth Stern and Mary Beth Whitehead, admittedly a dispute between a parent and a nonparent, would be an indication of what the result would have been between William Stern and Mrs. Whitehead if Mr. Stern had not been ascribed parental status. The New Jersey Supreme Court voided the adoption of Baby M by Elizabeth Stern. Id. at 411, 537 A.2d at 1234.

52 At one time, a father had a legal right to custody of his legitimate children, and the mother had no rights in competition with his. By means of the Tender Years Doctrine, many jurisdictions reversed this rule for infants and young children and created a preference for custody in the mother. With regard to illegitimate children, the mother rather than the father traditionally had a right to custody. Today, in response to equal protection requirements, most states disavow a preference for either parent regardless of whether the custody dispute involves a legitimate or illegitimate child. See, e.g., Ex parte Devine, 398 So. 2d 686 (Ala. 1981); Annotation, Modern Status of Maternal Preference Rule of Presumption in Child Custody Cases, 70 A.L.R.3d 266, 268-69 (1976). In Devine, the court decided that the doctrine constitutes "an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex." Devine, 398 So. 2d at 695. See also Watts v. Watts, 77 Misc.
Whether constitutional principles of equal protection require identical treatment of biological parents of children produced by commercial surrogacy and other biological parents is one of the difficult questions such contracts generate.

In Baby M, both courts assumed that the genetic link of William Stern to the child made him a natural parent for purposes of custody law. New Jersey has adopted the Uniform Parentage Act (UPA), which requires comparison of “natural parents” disputing custody to determine which would be the better custodian. The UPA accords parental status based on biology and does not define the term “natural parent.” It seems reasonable that the UPA intended to give equal status to genetic parents in ordinary circumstances, but the conclusion that the UPA mandates an equal comparison of genetic parents in a commercially created birth may not be justified. In adopting the UPA, the New Jersey legislature extended to illegitimate fathers rights they lacked at common law. One should not lightly assume that this statute in derogation of the common law intended to extend those rights to the commissioning party in commercial surrogacy—or in arrangements deemed illegal and perhaps criminal. The parental law was not, of course, passed with an intent to cover surrogacy specifically. Rather, the UPA was passed, as was other legislation in this area, on the assumption that genetic parentage springs from personal, rather than commercial, relationships. Commercial surrogacy runs contrary to this assumption. One must question whether a genetic parent deserves the high level of protection ordinarily reserved for the most personal rights.

2d 178, 183, 350 N.Y.S.2d 285, 291 (1973). In Craig v. Boren, 429 U.S. 190 (1976), the Court noted that classifications based on sex are subject to scrutiny under the fourteenth amendment. By imposing legal burdens on individuals according to the “immutable characteristic of sex,” the tender years presumption forces fathers to affirmatively show mothers unfit. In Devine, the court concluded that because its effect was to deprive some “loving fathers of the custody of their children,” the tender years presumption could not be justified as substantially related to a significant state interest. Devine, 398 So. 2d at 694 (quoting Craig v. Boren, 429 U.S. 190, 198 (1976)). See Uniform Parentage Act §§ 1-2, 9B U.L.A. 296 (1987)[hereinafter UPA]; Devine v. Devine, 398 So. 2d 686 (Ala. 1981); Bah v. Bah, 668 S.W.2d 663 (Tenn. App. 1983). See also infra note 111.

The New Jersey Supreme Court deemed both Mary Beth Whitehead and William Stern “natural parents” entitled to equal treatment under New Jersey’s Uniform Parentage Act (the Act). Baby M II, 109 N.J. at 453, 537 A.2d at 1256. The Act mandates equal treatment of parents regardless of their marital status and states that the natural father’s status may be established by proof of paternity. UPA § 2, N.J. STAT. ANN. §§ 9:17-40-41 (West 1988).

See Keane, supra note 28, at 152-54. This point is reminiscent of the argument made by proponents of surrogacy that because surrogacy was not widely known at the time of passage of child-selling laws, such laws may not relate to the practice.
The key to this puzzle may lie in considerations of the best interests of children and society's disapproval of commercial transactions creating rights to children. Principles of personal freedom as well as of parenthood assume some freedom and consent on behalf of parties who create a child together. The key to the puzzle certainly is not the existence or nonexistence of a genetic link between the "natural parent" and the child. A promise by parents for their daughter to marry a man and provide him with children is not enforceable, for the bride's consent is essential to the marital relationship. Similarly, rape is not a basis for parental rights. Moreover, a fraudulent or coercive surrogacy agreement is not an acceptable basis for parental rights anymore than fraud or coercion is a basis for rights arising out of any other contract. Yet the cases of the arranged marriage, rape, and fraud could all create a genetic link between one who might assert parental rights and a child. Once we decide that the genetic link is not the factor that determines the best interests of the child, the question becomes whether the status of "natural parent" can exist by contract without any biological link at all.

If commercial surrogacy is illegal, as the New Jersey Supreme

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65 Related to this issue is the validity of the consent of the surrogate to allow either the termination of her parental rights or the creation of rights in another based on a commercial contract.

66 Recent Indiana legislation mandates the exclusion of evidence that a child was produced by surrogacy in determining the best interests of the child unless the agreement was the result of fraud, duress, or misrepresentation. See 1988 Ind. Acts 175. The effect of this provision is that the biological parents in surrogacy are compared without a preference just as in Baby M and Yates absent extraordinary circumstances isolated as depriving the arrangement of valid consent.

67 A court would probably reject a custody claim by a man who fathered the child by rape even in a jurisdiction that has adopted the UPA's requirement of comparing natural parents. The court could reject the rapist's claim for custody either by determining that a rapist would not be a parent in the best interests of the child, or by declaring that forced intercourse is not an acceptable means of achieving the status of "natural parent." Similarly, most of us would not require child support payments of a man who consented to neither parenthood nor sexual relations with the mother of the child. Could a woman secure by deceit or with the help of a doctor the seminal fluid of a wealthy man, inseminate herself, produce a child and require support payments from the wealthy man? Our rejection of this scenario reveals a need for minimal consent required to claim status as "natural parent," perhaps the consent to sexual intercourse rather than consent to have a child. As the above hypotheticals illustrate, the genetic relationship is not inevitably sufficient in itself to create parental status. In the first situation, the genetic link of the rapist is not sufficient to create rights in the rapist for purposes of a custody contest. In the second case, the genetic link without consent of the wealthy man provides an insufficient basis to tie him to the responsibilities of parenthood. Should the consent and intent represented by the consensual undertaking of a commercial contract create parental status even though that consent is deemed insufficient to create a contract right?
Court held, states should seek to impose stronger sanctions to discourage the practice than that court employed. Possible sanctions are (1) refusal to recognize the parental status of either party to the surrogacy arrangement or (2) termination of parental status of either party. While these sanctions would discourage surrogacy, the state cannot use such drastic means of deterring surrogacy if to do so violates the constitutional rights of the parents. To determine the legal effect of the surrogacy agreement on parental rights, one must consider the interests of society as a whole and the interests of children born from surrogacy, as well as the interests of contracting parties.

The significant social and legal question of commercial surrogacy is whether individuals can use contracts to create and extinguish parental rights to a child yet to be born. In Baby M, the trial court answered this question in the affirmative, subject to a condition that the interests of the child be served by enforcement of the contract. At first blush, the supreme court in Baby M seems to have answered the question in the negative. The court invalidated the surrogacy contract and voided the termination of the mother's parental rights. But on the crucial question of the father's parental status, the court effectuated the contract and recognized William Stern's status as a natural parent of the child. While one could argue that William Stern's parental status is based on his biological link to the child rather than on the contract, a birth resulting from surrogacy is contrary to the underlying assumption that a genetic relationship is founded on a noncommercial relationship with the child or with the child's mother. Although the genetic relationship is the trigger for an equal comparison of parties under the UPA, this trigger usually assumes noncommercial consent.

The void in scholarship that this Article addresses is whether the

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See Baby M II, 109 N.J. at 421-22, 462, 537 A.2d at 1240, 1261. The supreme court did not clarify whether the deference to Mr. Stern as a parent is constitutionally required. If this is the basis for the recognition, the court must have accepted either Mr. Stern's relationship with the child resulting from an invalid ex parte order of Stern's contractual agreement as sufficient acceptance of responsibility on his part to create a parental right. See Part V of this Article discussing Lehr v. Robertson.

The question of custody rights of a genetic parent has not been sharpened to the point at issue in surrogacy arrangements. A determination of the rights of the individual parties to a given agreement necessitates consideration of the constitutional protections afforded parents and of the showing necessary to be entitled to such protections based on parental status. See Part V of this Article.

See Baby M II, 109 N.J. at 452-53, 537 A.2d at 1256. See also Part V dealing with the basis for parental rights recognized by the Supreme Court in Lehr.
commissioning party to a surrogacy agreement gains parental status either because of his genetic link to the child or because he purchased the right through contract. If surrogacy contracts are contrary to public policy, we should consider whose interests are served by recognizing the parental rights that rely on such contracts. In pursuit of this purpose, this Article assesses three possible bases for according the commissioning party status as a parent: (1) the contract, (2) the federal constitution, and (3) legislation.

Part II of this Article explores the elements essential to surrogacy in an attempt to determine what types of arrangements would be enforceable if surrogacy contracts are recognized. The conclusion of Part II is that the sine qua non of surrogacy is a preconception agreement for production and surrender of a child.

Part III sets forth the best interests of the child test for determining custody and compares the application of the test in the two Baby M opinions. Part III concludes that the grant of primary custody to William Stern rests on implicit recognition of Mr. Stern as a parent and on a judgment that the surrogacy contract is effective to establish parentage.

The last three parts of the Article explore three potential bases for recognizing the commissioning party in a surrogacy contract as a "natural parent." Part IV considers whether a contract should be regarded as a sufficient basis for acquiring parental status. It questions whether acceptance of the contractual declarations of the parties significantly undermines judicial power to determine the best interests of children. It also examines whether specific performance of the surrogacy agreement, including the promise to relinquish custody, should be available to the commissioning party if he is deemed a parent.

Part V considers whether the federal constitution requires recogni-
tion of the commissioning party as a parent for purposes of determining custody of the child born of surrogacy. The right to parent has been accepted as a fundamental liberty interest. Termination of this right to serve the public good is possible only if the state's interest is compelling. Part V concludes that the constitutional issue turns on whether denial of parental status to the commissioning party constitutes a termination of parental rights or merely a refusal to vest that status.

Part VI explores whether states should endorse surrogacy legislatively. Should parental status be accorded the commissioning party in a surrogacy arrangement as a matter of public policy even if not constitutionally required? This issue turns on whether surrogacy is indeed a new and unique arrangement that should be free of the old rules limiting the power of individuals to order privately rights in children. Part VI examines the policies that inform two established limitations on enforcement of contracts for custody of children: (1) the prohibition against the sale of children and (2) the prohibition against prebirth consent to adoption. Additionally, this part assesses the arguments that the dangers these policies protect against are alleviated in surrogacy because the contract is entered into prior to conception and the contract father is usually the genetic father of the child. This Article concludes that the basic principle against commodification of humans is a necessary limitation on surrogacy and that reliance on the genetic relationship or the preconception timing of the contract as safeguards against commodification is misplaced.

II. ESSENTIAL ELEMENTS OF SURROGACY

Before one can explore the limits or regulations possible in a jurisdiction that enforces surrogacy agreements, one must identify the elements of a surrogacy contract. The elements deemed essential to the arrangement influence the assessment of the public policy interests at stake.\textsuperscript{62}

\textsuperscript{62} Many proponents of surrogacy rely on future legislation to cure surrogacy's problems. See, e.g., Hollinger, supra note 28, at 869 and passim (suggesting that the government should follow the principle he calls "supportive neutrality," to "encourage procreative efforts of childless couples and remain neutral among couples making different choices"). Comment, Contracts to Bear a Child, 66 CALIF. L. REV. 611, 621-22 (1978). Note, Litigation, supra note 3, at 444.

Those who distinguish surrogacy from baby selling have found safeguards for children in circumstances that frequently exist in surrogacy. Specifically, they rely on the commissioning father's genetic link to the child. See, e.g., Note, Litigation, supra note 3, at 426; Greenberg & Hirsh, supra note 33, at 155. After setting forth the prohibition of payment for a biological parent's consent to adoption, the Iowa note discusses three cases in which adoption of a child by
The facts and posture of *Baby M* present surrogacy in its most compelling and least controversial form: The genetic father sought custody of a child born as a result of a surrogacy contract made because his wife was unable to bear a child. It is doubtful, however, that the law can limit the surrogacy arrangement to the circumstances presented here without violating equal protection requirements. The following factors, often present in surrogacy, are explored here to determine whether they are essential for either an enforceable surrogacy contract or for the recognition of parental status:

1. The party seeking custody under the agreement is the child's genetic father.
2. The genetic father is married.
3. Infertility of the father's wife is the reason for use of a surrogate.
4. The surrogate was artificially inseminated with the semen of the contract father.
5. The genetic father and the surrogate entered a contract, free of fraud, coercion, or mistake, and supported by consideration prior to conception.

extended family members was allowed despite the exchange of consideration. It argues that surrogacy contracts can be justified on the same basis. [T]he family adoption analysis could be applied when the state recognizes the sponsoring husband as the child's biological father. In this situation fees paid to the surrogate could be viewed as a private financial arrangement between members of the child's family, motivated by a concern for the child's best interests, rather than a pecuniary gain.

Note, *Litigation, supra* note 3, at 426. But is this the reason for the payment? In a recent study presented to the American Psychiatrists' Association, 125 women who had applied to act as surrogates were questioned concerning their backgrounds, and attitudes. Eighty-nine percent of the surrogate applicants stated that they would require a fee for their participation as a surrogate. See Parker, *supra* note 38, at 117. *See also Greenberg & Hirsh, supra* note 33, at 156. Reliance on the genetic relationship of the parent to the child and the preconception timing of the contract may be misplaced, however, if these safeguards are not essential elements of the surrogacy transaction and are not required for an enforceable surrogacy arrangement.

Although William Stern's claim was based on the contract, the remedy sought was essentially custody of the child. Moreover, the contract action sought specific performance of only the final promise of relinquishment of parental rights and custody rather than the more controversial claim for performance of other promises made in surrogacy. *See Part IV C* of this Article for a discussion of the other promises inherent in surrogacy contracts.

Mr. Stern's desire to reproduce genetically was linked to the tragic loss of his family in the Holocaust. *See also Baby M II*, 109 N.J. at 413, 537 A.2d at 1235. *See also Baby M I*, 217 N.J. Super. at 338, 525 A.2d at 1139.
In Baby M, the trial court did not expressly find any of the first four factors necessary to enforce the surrogacy contract. Rather, the court treated the issue of custody as a contract question and enforced the agreement because it was a valid contract. The trial court also noted that the facts present in Baby M may not always appear in surrogacy arrangements and did not expressly limit its holding to the particular facts of the case. Legal scholars writing in support of surrogacy have also rejected the first four factors listed above as limitations on surrogacy contracts.

A. Genetic Link of Contract Father

Proponents of surrogacy often rely on the presence of a genetic link between the commissioning party and the child to distinguish surrogacy from baby selling. Mr. Stern "cannot purchase what is already his," the trial court stated. But to require a genetic link before enforcing a surrogacy contract discriminates against the infertile. (The favored class is the fertile male with an infertile wife.) If a genetic link is a prerequisite, many people with the same problem of infertility that justifies surrogacy in the first place would be denied this option.

Commentators supporting surrogacy have found no valid distinc-

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64 See Baby M 1, 217 N.J. Super. at 333, 525 A.2d at 1137.
65 See Robertson, Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction, 59 S. CAL. L. REV. 939, 962-63 (1986)[hereinafter Robertson, Embryos](right of single persons to procreate by coital and noncoital means); Robertson, Procreative Liberty, supra note 18, at 430 (arguing that "[r]estricting the right of noncoital or collaborative reproduction to one purpose, such as relief of infertility, contradicts the meaning of a right of autonomy in procreation . . ."); Greenberg & Hirsh, supra note 33, at 155. See also, Kritchevsky, The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family, 4 HARV. WOMEN'S L.J. 1 (1981)(single persons should enjoy same liberty to procreate as married persons).
66 See, e.g., Note, Biological Father, supra note 34, at 87.
67 Baby M 1, 217 N.J. Super. at 372, 525 A.2d at 1157.
68 Such a requirement would also discriminate against couples of the same sex, especially male couples. This discrimination may not be deemed to rise to the level of an equal protection violation, however. The United States Supreme Court's holding in Bowers v. Hardwick, 478 U.S. 186 (1986), rejected the application of the right of privacy to sexual conduct between members of the same sex. A violation of the individual's right to equal protection of the laws seems much more of a danger if surrogacy is allowed for some and denied others. If a surrogacy agreement is valid for infertile married couples, on what basis can the right be denied homosexual couples or individuals? The only basis for denial is the best interests of the child. This basis loses much of its force, however, when the right is respected or rejected on the fine points of sexual orientation or marital status. Certainly homosexual individuals can make good parents. The risk of surrogacy is not that homosexuals will be empowered to raise children. The risk is the broader danger of general commodification of children and women and, thus, all individuals in the society that allows these sales.
tion between the purchasing party who uses his own sperm and the purchaser who uses the sperm of another.69 Insofar as the argument in favor of surrogacy rests on the constitutional rights of substantive due process and equal protection, one can justify no distinction between those able to reproduce genetically and those unable to do so.70 Relief from infertility (typically of the wife of a fertile male) is, after all, the original impetus for surrogacy. If surrogacy is deemed an acceptable option for couples like the Sterns, it must also be acceptable for a sterile husband, an infertile single female, and an infertile couple (i.e., where both the male and female are infertile),71 for these individuals cannot reproduce genetically.72

69 See, e.g., Robertson, Procreative Liberty, supra note 18, at 429-30.

70 One need not believe that the concept of equal protection requires validation of surrogacy in order to see an equal protection problem in allowing surrogacy in some circumstances and denying it in others because of the marital status of the commissioning parties or of the other characteristics dealt with here. If surrogacy becomes available as an option for reproduction, denial of that option based on characteristics must be justified by legitimate distinctions between those granted and those denied the right to employ a surrogate. Safeguards are not essential elements of the surrogacy transaction and not required for an enforceable surrogacy arrangement.

71 This is the argument made by Professor John A. Robertson in several articles on surrogacy and endorsed by the trial court in Baby M. See Baby M I, 217 N.J. Super. at 388, 525 A.2d at 1165. Professor Robertson argues that the inequality of reproductive capability between fertile and infertile people cannot be a basis for allowing some people to reproduce and not allowing others to reproduce. "The right of a couple to raise a child should not depend on their luck in the natural lottery, if they can obtain the missing factor of reproduction from others." Id. (quoting Robertson, Surrogate Mothers: Not So Novel After All, 13 Hastings Center Rpt. 5, 28, 32 (1983)).

Such an argument ignores reality, however. Even with surrogacy, the government cannot make people fertile. Fertility is not a benefit bestowed, or a detriment imposed, by the government. (The only case in which the Supreme Court addressed directly the right to procreate, Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942), established that the government cannot deprive individuals of their reproductive powers absent a compelling state interest of the highest order.) The danger of positing the principle of government control of reproductive powers—when it in fact does not exist—is that such control must come if the reproductive choices of some result in burdens to others. Those supporting surrogacy discount troublesome aspects of surrogacy by promising legislation will properly balance and regulate. If such regulation is effectuated, then the government dispersal of reproductive powers will be a reality.

Further, although parenting is a fundamental right, nothing in the constitution justifies the use of another person to exercise that fundamental right, especially if that exercise diminishes the same fundamental right of the other party. The New Jersey Supreme Court rejected the belief that "the constitutional right of procreation includes within it a constitutionally protected contractual right to destroy someone else's right of procreation." Baby M II, 109 N.J. at 448, 537 A.2d at 1254.

72 Surrogacy does not empower an infertile person to procreate. In the most typical setting (like that in Baby M), it empowers a fertile male to procreate by use of a fertile woman not his wife. What surrogacy grants to the commissioning party is the ability to enforce the promise to relinquish a child.
Factors that limit adoption as a solution have the same impact on the infertile couple as on couples, such as the Sterns, where only the wife is infertile. Equal protection considerations preclude limiting the rights of those who can not or choose not to be linked to the child genetically, without a legitimate reason for such a distinction. Requiring a genetic relationship as an essential element of surrogacy creates a classification of individuals based on ability to procreate and allows a benefit to those able to procreate (surrogacy) while denying the same benefit (a child by surrogacy) to those unable to procreate. No principled distinction for the difference in treatment exists. There is no basis to conclude that one group would make better parents than another. Moreover, the genetic relationship of the child to the purchasing father cannot be a necessary condition once surrogate contracts are recognized. Professor John A. Robertson, one of the most prolific scholars who support surrogacy, maintains that equal protection and due process principles require recognition of surrogacy contracts. He argues that because fertile couples are allowed to procreate, denial of the same right to the infertile violates the equal protection clause. The entire argument against requiring a genetic link between a commissioning father and a child rests on the assumption that some fundamental constitutional interest is implicated. But no such interest exists. Neither procreation nor parentage is a benefit distributed by the government. The equal protection clause prohibits laws that operate unequally and unfairly on certain classes of people. The decision of a state to refuse to enforce surrogacy contracts—whether expressed judicially or legislatively—operates equally, allowing no class of people to procure children by payment.


Robertson's theory is that the contracts should be enforceable as opposed to being effective to confer parental status as was held by the New Jersey Supreme Court. In Robertson's view, the Baby M court "had to leap over the needs of infertile couples, the autonomous choice of surrogates, and the welfare of offspring to focus solely on the importance of the gestational bond and the symbolic or exploitative taint of money." Robertson, Procreation Rights Ignored by Court, 121 N.J.L.J. 318 (1988).

See Robertson, Embryos, supra note 65, at 958-61.

The government has no obligation to enable individuals to exercise their constitutional rights. See, e.g., San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

It cannot be that because the government may not prohibit the use of contraceptives . . . or prevent parents from sending their child to a private school, . . . government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.

If surrogacy is recognized as a permissible reproductive option for some individuals, Professor Robertson's argument has considerable force. Married individuals with an infertile wife and a fertile husband seem the most likely to receive governmental endorsement for the use of surrogacy. If the state endorsed surrogacy only where a fertile husband with an infertile wife contracted for a child, the equal protection clause would require the same endorsement for couples in which both partners are infertile and for the unmarried. Professor Robertson's argument that procreation is a state-controlled monopoly poses a serious equal protection problem, but only when surrogacy is recognized as an option for some and denied others.

B. Married Parents

Although being raised in a home with both a mother and father is usually in the best interests of a child, limiting the use of surrogacy to this situation also violates equal protection requirements. That the couple wishing to raise the child is not married, or that the commissioning party—male or female—is single cannot constitutionally determine the validity of the agreement. Once recognized as a reproductive option for some, the surrogate method may not be denied others unless there is a legitimate distinction between the class of individuals receiving the benefit and those denied the benefit. The point raised above applies here. The absence of a constitutional basis to distinguish between married and unmarried parents does not mean that the constitution requires recognition of commercial surrogacy.

C. Infertility

The interests of the infertile in surrogacy and the desire for genetically related children provided the impetus for surrogacy and remain the strongest arguments in its favor. Articles on surrogacy typically

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77 See Robertson, Surrogate Mothers, supra note 5, at 33.
78 This means that the commissioning party may have no mate or a mate to whom he is not married.
79 See Robertson, Embryos, supra note 65, at 962.
80 See Robertson, Procreative Liberty, supra note 18, at 430.
81 See, e.g., Note, Litigation, supra note 3, at 415-17; Robertson, Embryos, supra note 65, at 939-47. See also Keane, The Surrogate Mother 11-17 (1981); Coleman, supra note 31, at 71-72; Robertson, Surrogate Mothers, supra note 5, at 28. Robertson maintains that the right to procreate is a fundamental right that cannot be curtailed by governmental action because "the state's monopoly of those functions [of reproduction] and the impact its denial will have on the ability of infertile couples to find reproductive collaborators" makes it reasonable to "view the
mingle discussion of the interests of infertile couples and the father's relationship to the child born of surrogacy; they suggest that infertility is the primary reason for surrogacy. Whether principled and constitutionally sound distinctions can be based on these grounds is doubtful, however. To date infertile couples have formed the majority of parties who have contracted for surrogate births. Yet no basis exists for denying surrogacy to a commissioning party who seeks the surrogate because of convenience rather than the infertility of the female partner.

The government probably has a legitimate interest in this area because the use of a surrogate to avoid the inconvenience of the birth process may be relevant to the ability or willingness of the commissioning party to fulfill the challenging role of parenting. As a practical matter, however, restricting surrogacy to the infertile would be impossible for at least two reasons. First, proving infertility (by a doctor's certificate, for example) would necessitate an unprecedented intrusion into the privacy of the commissioning party's wife (to say nothing of the pain and expense of the medical services). Second, such a regula-

refusal to certify and effectuate surrogate contracts as an infringement of the right to procreate." Id. at 33.

Attempts to limit the use of a surrogate to the infertile faces the same equal protection problems noted above.

See Robertson, Procreative Liberty, supra note 18, at 430 ("Restricting the right of noncoital or collaborative reproduction to one purpose, such as relief of infertility, contradicts the meaning of a right of autonomy in procreation and also raises insuperable problems of definition and monitoring.").

Professor Robertson asserts that the individual's reason for employing surrogacy may not be used to deny the arrangement. "The right of married persons to use noncoital and collaborative means of conception to overcome infertility must extend to any purpose, including selecting the gender or genetic characteristics of the child or transferring the burden of gestation to another." Id. (emphasis added). The person who hires another to bear a child merely to avoid the inconvenience of childbirth may be misinformed about the burdens of childrearing, however. That person may need to hire someone to sit up nights with a sick child, to change diapers, or to volunteer for the PTA.

To enforce an infertility limitation, a mechanism similar to that proposed in Michigan House Bill No. 5184 would be necessary. The 1981 legislature considered and defeated the bill that required couples seeking to obtain a child by use of a surrogate to obtain approval from probate court prior to insemination of a surrogate. The Michigan bill did not expressly require a showing of infertility. If infertility were a requirement, the certificate of infertility would probably be filed at this time. Such a certificate and the petition itself would create additional cost for the commissioning couple and enhance the likelihood that surrogacy would be an option for the wealthy only. The court would then investigate the couple's fitness or unfitness as parents. If the couple were determined to be fit, court approval would be registered and a surrogacy permit issued. Upon verification of pregnancy, the commissioning male could file an affidavit acknowledging paternity. Fourteen days after the birth of the child, the court could issue a final decree granting custody in the commissioning parents and terminating parental rights of the surrogate.
tion would probably be fruitless. Infertility is not susceptible to medical certainty. It springs from a variety of causes, both physical and psychological, both known and unknown. For this reason infertility is generally defined vaguely, as “the inability of a couple to achieve pregnancy after a year of trying to do so.” This definition is both medically defensible and completely subject to control by the couple (or individual) involved. Among those seeking surrogacy for convenience, falsification and subjective diagnosis are likely.

In Baby M, the trial court examined the term “infertility” as used in the surrogacy agreement between Mary Beth Whitehead and William Stern to assess Mrs. Whitehead’s claim that the contract should be rescinded on the ground of fraud. In giving the term “a broad meaning,” it defined infertility as “the inability to conceive and carry to term without serious threat of harm to one's physical well-being.” The trial court also left the determination of infertility to the individual judgment of Elizabeth Stern:

This court is satisfied that Mrs. Stern had a sound sense of threat to her well-being if she were to become pregnant. . . . A risk, though minimal, remains a risk to one who is faced with it and so it was a genuine risk to Mrs. Stern. Certainly, it is a subjective test that is being allowed to determine inability to carry without risk of harm.

The facts of Baby M illustrate the classification of infertility is largely within the power of the couple or individual seeking a child through surrogacy. Elizabeth Stern diagnosed herself as suffering from multiple sclerosis. The supreme court noted that Mrs. Stern’s fears of endangering her health by pregnancy “exceeded the actual risk.”

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86 “The inability of a couple to conceive after 12 months of intercourse without contraception.” See Infertility, supra note 25, at 35.

87 Baby M I, 217 N.J. Super. at 379-80, 525 A.2d at 1161. The court made no suggestion that infertility was a prerequisite to surrogacy.

88 Id. at 380, 525 A.2d at 1161.

89 Id.


91 Baby M II, 109 N.J. at 413, 537 A.2d at 1235. Additionally, the guardian ad litem for Baby M noted that “one could question the fact that Betsy Stern didn’t get the diagnosis of multiple sclerosis confirmed by another doctor until they were preparing for trial.” See Liebmann-Smith, supra note 90, at 188. Mrs. Stern was not infertile but rather was concerned about the health consequences to her of pregnancy. This raises the issue of whether her medical condition was the central motivation for the couple’s decision to seek a child through surrogacy rather than through natural reproduction.
D. Artificial Insemination

As with most legal issues, the questions surrogacy poses turn on the relationships and rights of individuals, not on the technology involved in a transaction. Although no one has raised the point, surely the absence of artificial insemination, a nonessential medical technique, could not destroy an otherwise enforceable contract. That insemination is achieved coitally rather than artificially probably would not change the legal force of the contract. In one sense the struggle in surrogacy law is the struggle of old law applied to new problems. The advent of the medical technique of artificial insemination has been credited with forming the basis for a new relationship and requiring a new contract right. But the only difference between the medical technique of artificial insemination by donor (AID) and impregnation by natural means is the slender syringe used for insemination. It cures no infertility; it provides no new ability for those unable to conceive. In fact, the legal struggle is the same; only the nonessentials have changed.

In Baby M, the trial court held that if a right to procreate exists, then the means of reproducing, coitally or noncoitally, cannot affect the interest protected from governmental intrusion.\(^9\)\(^2\) Indeed, the significant issue in surrogate agreements is not the means of insemination, artificial or natural; rather, it is whether a purchasing party can acquire parental rights by contract.\(^9\)\(^3\)

\(^{92}\) It must be reasoned that if one has a right to procreate coitally, then one has the right to reproduce noncoitally. If it is the reproduction that is protected, then the means of reproduction are also to be protected. The value and interests underlying the creation of family are the same by whatever means obtained. This court holds that the protected means extends to the use of surrogates. Baby M I, 217 N.J. Super. at 386, 525 A.2d at 1164. Viewing people as a means to an end rather than as individuals may create problems even when the person used consents to his or her own commodification.

\(^{93}\) Natural insemination was, of course, the method of procreation used by the first recorded surrogate birth: that of Ishmael. See Genesis 16:20. Justice O'Connor has made the point that focusing on medical technology as a reason for justifying or refusing to justify an abortion is misguided. Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 455-58 (1983)(O'Connor, J., dissenting). In the surrogacy context reliance on medical techniques as justification of legal rights seems misplaced for two reasons. First, medical procedures are subject to rapid change. Recognition of a medical procedure as the touchstone for a legal determination will almost certainly result in frequent and perhaps dramatic change in legal relationships so classified. As a consequence, certainty in legal relations will diminish. This is substantially Justice O'Connor's point about the use of abortion techniques as a basis for legal standards. Second, use of a medical technique as a legal test may be particularly inappropriate in the surrogacy context since the technique is totally unnecessary to the relationship. Any pregnancy achieved artificially can also be achieved coitally.
E. Preconception Contract

The one clear requirement of surrogacy is that the contract be entered into prior to conception. Otherwise, the transaction is the sale of a child. The central issue of surrogacy is the contract question of whether a woman can bind herself to relinquish a child by entering a contract before conception. In other words, is a baby something that cannot be sold once it exists but can be ordered on a preproduction (customized) basis? Does a preconception sale neutralize the dangers that exist in the traditional baby-selling contract? In Baby M, the New Jersey Supreme Court changed this inquiry only slightly by dealing with surrogacy as a custody dispute. The unavoidable issue is whether parental status can be created by a commercial contract.

Surrogacy is not a reproductive option that cures infertility in any medical sense. No infertile person is rendered fertile by surrogacy. Pursuant to the contract, a fertile male impregnates a fertile female. Surrogacy is a social mechanism to empower the commissioning party, typically a male, to obtain parental rights to a child.

An analogous manner of the private ordering of rights in children is the antenuptial agreement. A man who wishes to obtain a child without interference in rearing the child might require his bride to promise to grant a divorce and to relinquish all parental rights upon the birth of their child. But such an agreement would not be enforced. Antenuptial agreements, like other contracts, are subject to requirements of fairness.

Whether a surrogacy agreement should be recognized as creating

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94 The fertile male may or may not be the commissioning parent. By means of embryo transfer, the impregnation may occur outside the body of the surrogate. The egg fertilized may be from the surrogate, from the woman who plans to raise the child, or from a donor.

95 In New Jersey, the commissioning party to a commercial surrogacy agreement does not gain a contract right to the child born as a result of the arrangement. The commissioning party appears to obtain parental status by the contract, however—at least when he is the genetic parent of the child produced.

either a contract right to parent (as the trial court held in Baby M) or parental status (as the supreme court assumed in Baby M) depends on whether such recognition is consistent with our country's law of custody of children. The paramount concern in this area is protecting and serving the best interests of the child involved. Although by its name, the "best interests test" seems to provide a basis for assessing the claims of any litigant (even a nonparent) in a custody dispute, the standard has never been applied to defeat the rights of a parent except in extraordinary circumstances. From this perspective the issue of surrogacy is whether the contractual commitment presents such a circumstance.

III. The Best Interests of the Child

In the usual custody scenario, parental status of the litigants is clear. In surrogacy, however, the question is far from clear. Is the commissioning party a "parent" for purposes of a custody dispute? Is the commissioning party a parent only when he or she is genetically related to the child? Should the commissioning party be regarded as a parent only if the jurisdiction hearing the dispute accepts surrogacy as a valid, legal transaction? This section will examine the relationship of the best interests test and its preference for custody with a parent. Both courts in Baby M identified the best interests of the child as the controlling issue of the case. Neither court acknowledged, however, the significance of the classification of parental status in application of the best interests test or scrutinized the basis for William Stern's classification.

97 The meaning of custody is generally based on the typical life together of parents and child in a family setting, including a day to day control and supervision of the child. "In its broadest sense custody refers to the relationship which exists between parents and child in a normal, going family." H. CLARK, LAW OF DOMESTIC RELATIONS 573 (1968).

98 See Baby M I, 217 N.J. Super. at 388-90, 525 A.2d at 1166; Baby M II, 109 N.J. at 453, 537 A.2d at 1256. Application of the best interests test requires that the two disputants seeking custody be parents of the child. In Baby M II, the holding that custody depends on the best interests of the child may implicitly require a valid agreement between these parents. It is doubtful that the court would have recognized Stern as a parent if the birth had resulted from a non-consensual act such as a rape, or if the contract with Mary Beth Whitehead was the result of fraud or coercion. In effect, the supreme court inverted the two factors considered by the trial court as controlling: (1) the contract; and (2) the best interests of the child. While the trial court found the contract enforceable subject to the implicit condition of the child's best interests, the supreme court held the best interests test determines custody, subject in all probability to an implicit condition that the contract meet some standard of fairness.

99 Both courts articulated the best interests test as though it operates without regard to the parental status of the litigants. The trial court stated: "Where courts are forced to choose between a parent's rights and a child's welfare, the choice is and must be the child's welfare and best interest by virtue of the court's responsibility as parens patriae." Baby M I, 217 N.J. Super. at
1988-89] SURROGACY CONTRACTS 617

as a parent. The trial court found the surrogacy contract specifically enforceable, subject to an implied-in-law condition that the enforce-
ment serve the best interests of the child. After rejecting the contract-
tual basis of William Stern's claim, the supreme court treated the case
as a custody dispute between parents and compared the two genetic
parents without a preference for either.

323, 525 A.2d at 1132 (citing In re J.R. Guardianship, 174 N.J. Super. 211, 224, 416 A.2d 62, 68 (App. Div. 1980)). Such a conflict between the rights of the parent and the welfare of the child typically occurs only when the parent is unfit, however; such a finding will remove parental status for application of the best interests test. While some states have allowed a nonparent to retain custody despite a cause of action filed by a fit parent to regain custody, this limited exception to the preference for a fit parent applies only in cases where parents voluntarily and for a long time surrender custody to the other party. In such cases, courts have compared the natural parent with the party who has had extended custody without a preference for the parent. See, e.g., In re J.R. Guardianship, 174 N.J. Super. at 223, 416 A.2d at 67. Such cases recognize parental status by virtue of a relationship of responsibility and care for a child rather than by a genetic link with the child. Courts deem these parents to be "psychological parents." See Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844 n.52 (1977); Huynh Thi Anh v. Levi, 586 F.2d 625, 634 (6th Cir. 1978) (stressing that the important element the state court should consider in determining custody is whether the children's American foster parents had become the boys' psychological parents); M.H.B. v. H.T.B., 100 N.J. 567, 571-74, 498 A.2d 775, 777-78 (1985). See also, Johns v. Department of Justice, 653 F.2d 884, 886 (5th Cir. 1981); Drummond v. Fulton City Dep't of Family, 563 F.2d 1200, 1206-07 (5th Cir. 1977). The psychological parent is afforded parental status and compared with the genetic parent without a preference for either. But no basis for such elevation of the commissioning party in surrogacy exists by the surrogacy agreement alone. If the surrogate mother surrendered the child to the father and then after an extended period sought to reclaim the child, the father who had achieved status of psychological parent should be compared with the mother whether or not he or she is genetically related to the child.

The trial court recognized William Stern as a parent based on the contract. See Baby M I, 217 N.J. Super. at 390, 525 A.2d at 1166. The trial court relied on the genetic relationship of William Stern to Melissa yet also noted that such a relationship is not necessary for surrogacy. Id. at 333, 525 A.2d at 1137.

The supreme court accepted William Stern as a parent based on the Parentage Act of New Jersey, N.J. STAT. ANN. § 9:17-39 (West 1988). See Baby M II, 109 N.J. at 453, 537 A.2d at 1256. The court did not determine whether the statute's term "natural parent" was intended to include the genetic father who begets a child by means of a surrogacy agreement. The Parentage Act displaces the common law which gave an illegitimate father no rights in his genetic children. A statute in derogation of the common law should be narrowly construed to prevent unintended changes in the common law. See Isbrandtsen Co. Inc. v. Johnson, 343 U.S. 779, 783 (1952); United States v. Tilleras, 709 F.2d 1088, 1092 (6th Cir. 1983); Devers v. City of Scranton, 308 Pa. 13, 17, 161 A. 540, 542 (1932). Principles of statutory construction suggest that the court should not lightly assume that by adopting the Uniform Parentage Act, the legislature intended to include in the undefined term "natural parent" the genetic father who acquired his genetic relationship with a child by a means the court found to be "illegal" and "perhaps criminal." The determination of parental status based purely on a genetic relation will be explored further in Part VI of this Article.

See Baby M I, 217 N.J. Super. at 390, 525 A.2d at 1166.

See Baby M II, 109 N.J. at 453, 537 A.2d at 1256.
The best interests of the child are the primary concern in custody cases,\(^\text{103}\) as well as in a variety of other cases where the interests of a child are at stake.\(^\text{104}\) In custody disputes, courts do not determine the child’s best interests simply by comparing the litigants.\(^\text{105}\) Rather, a

\(^{103}\) Courts strive to protect and further the interests of the child who is the subject of a custody dispute, relying on the *parens patriae* powers. See, e.g., *Baby M*, 217 N.J. Super. at 323, 525 A.2d at 1132-33; *In re J.R. Guardianship*, 174 N.J. Super. at 224, 416 A.2d at 68. See also *Wilson v. Mitchell*, 48 Colo. 454, 465, 111 P. 21, 25 (1910); *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 103, 118, 24 Eng. Rep. 659, 664 (Ch. 1722); *Note, Alternatives to “Parental Right” in Child Custody Disputes Involving Third Parties*, 73 Yale L.J. 151 n.3 (1963)[hereinafter *Note, Alternatives*]; *Note, Parent and Child—Parent’s Right to Custody as Against Third Parties*, 4 U. Pitt. L. Rev. 302 (1938); *Sayre, Awarding Custody of Children*, 9 Univ. Chi. L. Rev. 672, 686 (1942). Some jurisdictions approach the custody issue from the perspective of parental rights. The ultimate aim of a custody determination is the same in all jurisdictions, however: protection and enhancement of the interests of the child. Classification of the issue as one of parental rights reflects a presumption that custody with a parent is in the child’s best interests. See *H. Clark*, supra note 97, at 591 (footnotes omitted).

In adoption cases, the best interests test is applied only after parental rights have been severed.

Where there is an objection by a natural parent to an adoption, and a finding that the statutory prerequisite of forsaking of parental obligations has not been met, the rights of the natural parent cannot be cut off, and the adoption must be denied. On such a record, the court does not even reach the element of the best interests of the child, since the termination of parental rights is a condition precedent which must be met before final adoption. *In re Adoption of a Child*, 164 N.J. Super. 476, 487, 397 A.2d 341, 346 (1978).


\(^{105}\) Without regard to the parental status of the litigants before the court, application of the best interests test in custody disputes would create unprecedented power in courts to remove children from their homes—whether or not they were born as a result of surrogacy—and to place them in homes offering what a particular judge regards as beneficial. United States courts have consistently refused to disregard the natural affection between parent and child in this way.

The starting point for this discussion is the obvious but often overlooked principle that in the going family the parents are entitled to the custody of their children. Even if they are not very skillful parents, the state does not interfere with their efforts unless the child is so seriously in trouble as to be within the statutes defining neglected or delinquent children, and even then the parents may retain custody under some state supervision. One reason for this is the firmly held belief that with all their faults and mistakes parents will generally be more successful in caring for their children than strangers or agencies of the state. There is also the traditional conviction that the profound and elemental emotional ties between parent and child should be respected by the state.
universal preference for custody in the parent of the child tempers the best interests analysis. The parental preference has been described alternatively as a doctrine protecting parental rights or as a doctrine furthering the best interests of the child based on a generalized judgment that custody with the parent is in the child's best interests.\(^\text{106}\)

Of the three possible configurations of litigants in custody disputes—(1) parent vs. parent, (2) nonparent vs. nonparent, and (3) parent vs. nonparent,\(^\text{107}\) the parental preference affects only the last configuration, when a parent and a nonparent compete for custody.\(^\text{108}\) In Baby M, both courts treated the dispute as falling within the first category and raising the same issue as the traditional custody dispute between parents. This approach advances dramatically the case of the commissioning party in a surrogacy agreement. The trial court in Baby M held that Mary Beth Whitehead was a fit parent but that she would not be the best parent for the child.\(^\text{109}\)

Because the New Jersey Supreme Court treated the case as a dispute between parents, it did not address the issue of the strength of the parental preference in the context of custody as opposed to a context where parental rights are terminated.\(^\text{110}\) The effect of the holding is to

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\(^\text{106}\) See Santosky v. Kramer, 455 U.S. 745, 760-61 (1982). See also Goldstein, Freud & Solnit, Before the Best Interests of the Child, (1979) ("So long as the child is part of a viable family, his own interests are merged with those of the other members. Only after the family fails in its function should the child's interests become a matter for state intrusion.").

\(^\text{107}\) The third category includes an action by the state to sever custody of a parent.

\(^\text{108}\) In the first instance both parties are of equal status and thus the preference applies to each but works a preference for neither. See H. Clark, supra note 97, at 581-90. In the second category no parental preference operates because neither party to the dispute is a parent. Id. at 596-97. The third category is the sphere for application of the parental preference.

\(^\text{109}\) Baby M I, 217 N.J. Super. at 397, 525 A.2d at 1170. Because the trial court in Baby M based its decision on the contract, it apparently endorsed the recognition of parental status for unrelated parties so long as the contract is not coercive or fraudulent. The trial court had no need to address this question since William Stern is the genetic father of Melissa. The court imposed no limit of genetic relationship on its contract holding, however. Id. at 333, 525 A.2d at 1137.

\(^\text{110}\) The New Jersey Supreme Court noted:

Although the best interests of the child is dispositional of the custody issue in a dispute between natural parents, it does not govern the question of termination. It has long
recognize parental status in the commissioning party—at least when that party is genetically related to the child. No termination of the parental rights of Mrs. Whitehead was necessary because William Stern was deemed to be a parent of the child and, thus, a litigant who could be compared with the child’s mother without a preference for the mother.111

A. Parental Preference

Because both New Jersey courts assumed that William Stern was a parent for purposes of the custody dispute, neither court confronted what is required to achieve parental status. Nevertheless, to enforce a surrogacy contract or to decide a custody dispute arising from it, the threshold question is whether the commissioning party (genetically related to the child or not) has parental status. If so, in a custody dispute, the court can compare him and the natural mother without a preference for either party.112 If not, the court must place him in the position


Surely if William Stern were deemed to be a nonparent, the same policy against stripping a parent of all rights would require a preference for Mrs. Whitehead (in the less than total destruction of parental rights effected by a grant of primary custody to the nonparent). The policy implications in the two situations are the same although the need for protection is more pronounced when rights are terminated.

111 In the surrogacy context, the same burden of proving the surrogate mother unfit inheres if the mother is recognized as a parent while the commissioning father (or party) is not accorded parental status. If gender alone confers this beneficial status, the burden of showing her an unfit parent would resurrect the tender years doctrine. See supra note 52. But if the burden is imposed because the surrogate has a relationship with the child, no violation of the equal protection clause is apparent.

In Baby M II, the supreme court noted that the equality required to protect mothers and fathers disputing custody of a child does not require “that all of the considerations underlying the ‘tender years doctrine’ have been abolished.” 109 N.J. at 453 n.17, 537 A.2d at 1256 n.17. Other jurisdictions have continued to emphasize the factors given weight under the tender years doctrine. See, e.g., Tenn. Code Ann. § 36-6-101(d)(1987); Bah v. Bah, 668 S.W.2d 663 (Tenn. App. 1983)(holding that a child of 2½ years would be placed in the custody of his father even though the mother was not held unfit). “To the extent the ‘tender years’ doctrine has continued efficacy it is simply one factor to be considered in determining custody, not an unyielding rule of law. The only rigid principle is that the best interests of the child are paramount in any custody determination.” Id. at 666. See also Note, Biological Father, supra note 34, at 92.

112 Some states also recognize a presumption for the parent in custody at the time the dispute arises. See, e.g., Henrikson v. Gable, 162 Mich. App. 248, 412 N.W.2d 702 (1987). It could be argued that the trial court applied a preference favoring the commissioning father. The court emphasized Mrs. Whitehead’s contract to relinquish the child, suggesting—although not expressly
of a nonparent, sometimes termed a “stranger” to the child, who must show that the mother’s parental rights should be terminated because she is unfit as a parent, or otherwise overcome the preference for custody in the parent.

To resolve a custody dispute where only one of the litigants is a legal parent, all jurisdictions give great weight to the parent’s status. Two approaches effectuate the preference for the parent over the nonparent: (1) “the best interests of the child” approach and (2) “the parental rights” approach. In theory, the “parental rights” approach inquires whether the parent has forfeited rights to the child either by abandonment or failing to be a fit parent. The “best interests” approach, on the other hand, appears to consider only the child’s interests in placement that would provide the most benefit or least detriment to the child. Yet no jurisdiction appears to adopt either extreme. None holding—that the fact of contracting was a strike against her under the best interests comparison. See Baby M II, 109 N.J. at 452-53, 537 A.2d at 1256. Moreover, the trial court attached no special significance to (or at any rate did not discuss) William Stern’s participation in an illegal contract in order to gain parental rights.

In this context “stranger” includes anyone other than a party classified as a legal parent. See H. CLARK, supra note 97, at 591 n.l.

See Santosky v. Kramer, 455 U.S. 745 (1982); Baby M II, 109 N.J. 396, 537 A.2d 1227. This role is not typically undertaken by an unrelated party. Most determinations of unfitness are made by the State Department of Human Services. After termination, adoption of the child could be secured through administrative channels of the same agency. See H. CLARK, supra note 97, at 593 (suggesting that less weight be given a public or private agency than one who has cared for the child).

The quantum of evidence necessary to overcome the parental preference varies among jurisdictions. In New Jersey, the supreme court has required the “clear and convincing evidence” standard mandated by Santosky for terminating parental rights. See E.E.B. v. D.A., 89 N.J. 595, 601, 446 A.2d 871, 874 (1982). But in Baby M II, the Supreme Court of New Jersey did not address what standard must be met to overcome the parental preference when determining custody because it deemed both Mr. Stern and Mrs. Whitehead parents of the child.

Judicial application of the best interests test may be seen as a continuum from consideration of the child’s interests alone at one pole to consideration of the rights of the parent alone at the other extreme. See Note, Alternatives, supra note 103, at 151, 154 (stating that courts have “created a continuum from a neutral determination of the best interest of the child to a disguised
applies a pure best interests test or a pure parental rights test. All consider the interests of both the child and the natural parent. Invariably, courts that apply the best interests test to compare a parent and a nonparent do so in the context of a noncustodial parent seeking to regain custody of a child. Moreover, all jurisdictions apply a presumption that the child's best interests lie in the custody of a natural parent rather than a nonparent. The strength of this preference varies within and among jurisdictions. In *The Law of Domestic Relations*, Professor Clark describes the two approaches to custody as "a difference in emphasis and in standards for tolerable parental performance rather than a clash of opposing rules of law." Clark suggests

The distinction between the versions of the test applied appears in resolution of the custody dispute between Mary Beth Whitehead and Elizabeth Stern. The trial court did not find Mary Beth Whitehead to be unfit. See *Baby M I*, 217 N.J. Super. at 397, 525 A.2d at 1170. Rather, it found by clear and convincing evidence that Elizabeth Stern would be the better parent. Such a rebuttal preference for the natural parent was described in 1963 as the majority approach to custody disputes between a parent and a nonparent. See Note, *Alternatives*, supra note 103, at 152. By contrast, the New Jersey Supreme Court held that parental rights of Mary Beth Whitehead could not be terminated absent a finding of unfitness. *Baby M II*, 109 N.J. at 426, 537 A.2d at 1242. This test is mandated when the litigation would terminate parental rights. See Santosky v. Kramer, 455 U.S. 715, 768-69 (1982). To determine which parent should serve as primary custodian, courts consider a wide variety of factors.

The Kansas Supreme Court laid the foundation for the view that the best interests of the child should control a custody termination. In *Chapsky v. Wood*, 26 Kan. 650 (1881), the Kansas Supreme Court found that custody of a child is not a property right and, thus, cannot be decided without regard to the holder's conduct or moral qualities. *Chapsky* involved a father's attempt to regain custody of his daughter after she had been raised by a Mrs. Wood for 5½ years. The court weighed wealth, social position, health, and education prospects, and resolved to leave the child with Mrs. Wood. While the court recognized that a natural father had a *prima facie* entitlement to custody corresponding to the common law duty of support, it noted that this "right" is not absolute. When a nonparent fulfills the parental role "the ties of blood weaken and ties of companionship strengthen." *Id.* at 653. The court focused on three factors: the right of the father (natural parent), the right of the one who has filled the parental role, and, paramountly, the welfare of the child. *Id.*

In *Halstead v. Halstead*, 259 Iowa 526, 144 N.W.2d 861 (1966), a teenage mother who had been married and divorced several times, left her 12 year old son with paternal grandparents. The court recognized the mother's right, but invoked the best interests analysis. Particularly persuasive was the 12 year old's preference to remain with the grandparents. See also *Grover v. Grover*, 143 Me. 34, 54 A.2d 637 (1947); *Wilkins v. Wilkins*, 324 Mass. 261, 85 N.E.2d 768 (1949).

that in applying the best interests test the court should “place the advantages of a parent’s care high in the scale of factors conducive to the child’s welfare.”\textsuperscript{122} A nonparent may be awarded custody of a child despite the parent’s request for custody only if the evidence overcomes the presumption that the child’s best interests are served by giving custody to the natural parent.\textsuperscript{128}

Review of cases and scholarship on the application of the best interests test in custody disputes reveals that the test has operated as a straightforward comparison of two litigants only when they have equal status, \textit{i.e.}, when: (1) both litigants are parents of the child concerned,\textsuperscript{124} (2) one parent seeks to regain custody from a “psychological

\textsuperscript{122} Id.

In any controversy between a parent and a stranger the parent as such should have a strong initial advantage, to be lost only where it is shown that the child’s welfare plainly requires custody to be placed in the stranger. The cases sometimes state this principle in terms of a presumption that the child will fare best in the parent’s custody. This is a broader test than whether the parent is “fit” or “unfit” since it requires looking at the whole situation rather than just at the parent’s qualifications.

\textit{Id.} See also Sayre, supra note 103, at 681-83.

\textsuperscript{123} The quantum of evidence necessary to overcome the parental presumption varies greatly among jurisdictions. Some courts have described the burden of evidence as “clear and convincing,” “clear,” “plain and certain,” “strong and satisfactory,” “cogent and convincing,” and “substantial,” or merely a “preponderance of the evidence.” \textit{See In re Perales,} 52 Ohio St. 2d 89, 369 N.E.2d 1047 (1977). If the parental right to custody can be defeated by a showing of a preponderance of the evidence that the parent is not fit, the distinction between termination of parental rights and determination of custody is vastly different as a constitutional matter. Parental rights can be terminated only if unfitness is shown by clear and convincing evidence. \textit{See Santosky,} 455 U.S. 745, 768-69. Even in cases in which the lower standard of proof of a mere preponderance of parental unfitness is sufficient, the result is not the equivalent of comparing the two parties seeking custody to determine which is the better custodian. \textit{See Perales,} 52 Ohio St. 2d at 98, 369 N.E.2d at 1052.

\textsuperscript{124} The sole question in a custody dispute between parents is the best interests of the child (\textit{see, e.g., Baby M II,} 109 N.J. at 453, 537 A.2d at 1256) because the presumption favoring a parent operates equally for each disputant, causing a preference for neither. The court applying the test decides which of the parents will be the better custodial parent based on any of a wide variety of factors and awards primary custody to that parent.

For a criticism of the best interests standard, see Elster, \textit{Solomonic Judgments: Against the Best Interest of the Child,} 54 U. CHI. L. REV. 1 (1987). Many commentators have noted problems with the current mechanism for providing for the welfare of children of divorced couples, the principal group of children for whom the best interest test is applied. \textit{See, e.g., Kubie, Provisions for the Care of Children of Divorced Parents: A New Legal Instrument,} 73 YALE L.J. 1197 (1964). In this article, Dr. Kubie suggests that upon divorce parents agree to joint custody and to the formation of a committee to resolve any disputes that arise between the divorced parents regarding the child’s welfare. It is unlikely, however, that joint custody alone or with an arbitration committee would be a feasible solution to the custody dispute in surrogacy cases. The parties to the surrogacy agreement typically do not know each other well, and, by the time of the custody dispute, are antagonistic toward one another. \textit{See Baby M I,} 217 N.J. Super. at 357-59, 525 A.2d
parent” who has raised the child for some time, or (3) both litigants are nonparents. The last two situations are unlikely to influence the surrogacy context. The custody dispute is likely to arise before enough time has elapsed to develop a relationship with a “psychological parent,” and the biological mother becomes a nonparent.

Without some deference to the parent, every family is at risk from competition from a stranger who wants custody of a child and who can give the child more benefits than the family can. Courts check the power of the state by putting a gloss on the best interests test: They note that a child’s being “better off” in a home other than that of the natural parents is not a ground for adoption over the objections of a parent. The New Jersey Supreme Court adverted to this point when it reversed the trial court’s termination of Mary Beth Whitehead’s pa-

at 1149-50; Note, Alternatives, supra note 103, 151-52.

Some of the factors courts use to decide a child’s best interests include the financial resources of the parent, the temperament of the parent, the morals of the parties, religious and social views of the parties, and the relative benefits or disadvantages to the child with each parent. See H. Clark, supra note 97, at 584-90. In Baby M, the trial court recited at length the opinions of the experts in psychology who testified at the trial. Baby M I, 217 N.J. Super at 355-69, 525 A.2d at 1148-56. While the supreme court affirmed the trial court’s award of custody to Mr. Stern, it simplified the approach to determining the child’s best interests and expressly disapproved the emphasis of the trial court’s treatment of some factors. The supreme court noted that the stability of the Whitehead home was doubtful at the time of trial. It also considered factors in the present—including the “track record of sorts—during the one and a half years of custody” with the Sterns. Baby M II, 109 N.J. at 452-63, 537 A.2d at 1255-61. In its response to the trial court’s reliance on the benefits of the educational opportunities available in the Stern household, the supreme court summarized the factors it found significant in the best interest test:

[I]t should not be overlooked that a best-interest test is designed to create not a new member of the intelligentsia but rather a well-integrated person who might reasonably be expected to be happy with life. “Best interests” does not contain within it any idealized lifestyle; the question boils down to a judgment, consisting of many factors, about the likely future happiness of a human being. Stability, love, family happiness, tolerance, and, ultimately, support of independence—all rank much higher in predicting future happiness than the likelihood of a college education.

Baby M II, 109 N.J. at 460, 537 A.2d at 1260 (citations omitted).

Mrs. Whitehead appeared to have proper respect for educational goals. The trial court noted that the surrogate’s fee was intended by Mrs. Whitehead to “assist her in providing for her children’s long range educational goals.” Baby M I, 217 N.J. Super. at 342-43, 525 A.2d at 1142.

See Mnookin, supra note 49, at 282-83.

See supra note 99.

See, e.g., Ex parte Wolfenden, 48 Tenn. App. 433, 446, 348 S.W.2d 751, 757 (1961). See also Mnookin, supra note 49, at 269-70 (suggesting that courts sometimes improperly remove children from natural parents when the lifestyle of a parent conflicts with a judge’s personal values).
rental rights. The New Jersey court compared Mrs. Whitehead and Mr. Stern without any assessment of parental interest because it accorded both disputants the status of parent.

In custody disputes between nonparents and parents, the best interests test considers parental status. The commentators who contend that the best interests test should replace the parental rights doctrine make their case in the context of the child who has developed a relationship with the nonparent under acceptable circumstances. Professor Mnookin highlights the shared assumption that the function of the best interests test is "to enforce minimum social standards" rather than to "intervene coercively in an attempt to do what is best or least detrimental" for the child.

Suppose there are two couples, the Smiths and the Joneses. The Smiths wish to adopt a child. The Joneses have a four-day-old baby daughter whom they wish to keep. . . .

Suppose both Smith parents were well educated, wealthy, and healthy; loved children; and appeared to be highly successful parents with two older

[129] Although the question of best interests of the child is dispositive of the custody issue in a dispute between natural parents, it does not govern the question of termination. It has long been decided that the mere fact that a child would be better off with one set of parents than with another is an insufficient basis for terminating the natural parent's rights. Baby M II, 109 N.J. at 445, 537 A.2d at 1252.

[130] For example, McGough and Shindell, in Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes, 27 EMORY L.J. 209, 215-16 (1978), present the case of Susan (an actual case studied by the Family Law Section of the American Bar Association) in which a father sought to regain custody from maternal grandparents who had reared the child for 11 years. The authors point out that under the parental rights doctrine, the father would probably prevail, as long as he was not unfit and had not forfeited his right to custody. Under the best interests of the child standard, the court could make a full inquiry into Susan's welfare and consider the strong psychological parent relationship with the nonparents. Use of this standard makes it much more likely that the nonparents would prevail and retain custody of Susan.

[131] Mnookin, supra note 49, at 268. In this article, Professor Mnookin explored the current law of child custody in the areas of divorce, guardianship, juvenile court, and child neglect law and termination of parental rights. He criticizes the best interests standard as "indeterminate," that is the standard is not capable of effective implementation:

The indeterminacy flows from our inability to predict accurately human behavior and from a lack of social consensus about the values that should inform the decision. . . . Our inadequate knowledge about human behavior and our inability to generalize confidently about the relationship between past events or conduct and future behavior make the formulation of rules especially problematic. Moreover, the very lack of consensus about values that makes the best interests standard indeterminate may also make the formulation of rules inappropriate: a legal rule must, after all, reflect some social value or values.

Id. at 264.
children. Suppose the Joneses were older; had no experience at child rearing; had severe financial problems; and Mr. Jones was in bad health. There are certainly plausible and perhaps even persuasive reasons to believe the child's "life chances" would be greater if placed with the Smiths. And yet, a decision to remove the daughter from the Joneses for placement with the Smiths would be considered by most in our society to be monstrously unjust. On the facts of the hypothetical, most judges and other state officials would no doubt refuse to remove. But the legal standards themselves, by asking an indeterminate and inappropriate question, invite an overly ambitious and inappropriate response.¹³²

Although the view that the interests of the natural parent and the child coincide has been criticized,¹³³ it finds support in decisions of the United States Supreme Court in the related area of termination of parental rights. For example, in Santosky v. Kramer,¹³⁴ the Court overturned the termination of the natural parents' custody because the state procedure bifurcated the interests of the parent and child without a finding of parental unfitness.¹³⁵

At the fact finding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at the initial proceeding, the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge.... But, until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.¹³⁶

Additionally, in Santosky, the Supreme Court noted that protection of the parent-child relationship is particularly desirable in proceedings that "employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge."¹³⁷ Custody proceedings, like termination proceedings, are marked by the subjective nature of the inquiry.¹³⁸ Although in Santosky the issue was the per-

¹³² Id. at 268-69.
¹³³ See, e.g., Note, Alternatives, supra note 103, at 154.
¹³⁵ The applicable state statute required that the judge make his order of parental unfitness "solely on the basis of the best interests of the child," and without reference to the natural parent's rights. Id.
¹³⁶ Id. at 762.
¹³⁷ Id.
¹³⁸ Concerning the judge's discretion, Mnookin stated: "What is best for children is often indeterminate; broad and discretionary standards for child-protection invite decisions based on the values of the particular judges and state officials responsible for a particular case." Mnookin, supra note 49, at 267. See also Note, Alternatives, supra note 103, at 153 ("courts which use the more prevalent best interest test operate in a comparatively free-wheeling manner"). Indeed because of the unavoidably subjective nature of the best interests test, Mnookin urged rejection of
manent termination of parental rights rather than custodial placement, the concept of shared interest within the parent and child relationship applies to the custody proceeding as well. Indeed, to the extent that the custody decision limits visitation and rights to influence decisions about the child's welfare, it may operate as a de facto termination of parental rights. The New Jersey Supreme Court noted this fact: "It seems obvious to us that since custody and visitation encompass practically all of what we call 'parental rights,' a total denial of both would be the equivalent of termination of parental rights. . . . That, however, as will be seen below has not occurred here." The heightened standard of clear and convincing evidence may not apply to a mere custody determination involving a parent and a nonparent. Recognition of the connected interests of parent and child argues for some presumption—whether it is called "parental rights" or the "child's best interests."

B. Parental Status in Surrogacy

The significance of the parental relationship to a disputed child highlights the need to decide the question of parental status in the surrogacy context. In its essential form, the question is simply whether a contract can serve as a basis for parental rights. When a claim of pa-

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the test because it is unworkable. He observed that a judge usually will not have enough information to make the proper decision:

But even where a judge has substantial information about the child's past home life and the present alternatives, present-day knowledge about human behavior provides no basis for the kind of individualized predictions required by the best-interests standards. There are numerous competing theories of human behavior, based on radically different conceptions of the nature of man, and no consensus exists that any one is correct.

Mnookin, supra note 49, at 258.

See Santosky, 455 U.S. at 753. In Baby M I, the trial court based its termination of Mary Beth Whitehead's parental rights on the contract rather than on a finding that she was an unfit parent. Baby M I, 217 N.J. Super. at 399, 525 A.2d at 1171. This holding apparently violated Santosky v. Kramer. But the New Jersey Supreme Court overruled the termination of parental rights on public policy grounds rather than on the constitutional violation. See Baby M II, 109 N.J. at 450-51, 537 A.2d at 1255.

The relational aspect of determinations that involve the rights of both the parent and the child has been noted in other areas as well. In Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work, 51 S. CAL. L. REV. 769 (1978), Professor John Garvey suggests that the focus of questions of state control over juvenile behavior and custody should be the protection of the family's autonomy. "[T]he interest in familial privacy protected by the due process clause is not strictly parental, but relational—a right held by parent and child alike." Id. at 770.

Baby M II, 109 N.J. at 451, 537 A.2d at 1255 (citing Franz v. United States, 707 F.2d 582, 602 (D.C. Cir. 1983)).
rental right is based on a surrogacy contract, no separation of the question of contractual rights from the custody issue is possible. The parental rights of the contract parent are established by contract. Parental status is not merely a matter of genetics. For a father to establish parental status such that a state must take cognizance of the father's rights, some relationship—either between the father and the child's mother or between the father and child—is necessary. A state may recognize an individual as a father based on some indicia other than his relationship with the child, but such indicia may not infringe on the surrogate's constitutional right to parent. For married persons, the marriage establishes the father's parental status toward the children of the marriage. Presumptions of legitimacy further the public interest of promoting parental rights and responsibilities within marriage. When parents are not married, the father's parental status exists as a constitutional matter only when he has established a relationship of responsibility for the child.

Recognition of the contract between William Stern and Mary Beth Whitehead was essential to the award of custody to William Stern because William Stern's claim to a parental right of custody could not be based solely on his genetic link to the child. His agreement with Mrs. Whitehead is the putative link of a relationship of responsibility for the child. When the New Jersey courts gave William Stern


144 Traditionally, parental rights are established by marriage. "[T]he relation between a father and his natural child may acquire constitutional protection if the father enters into a traditional marriage with the mother." Lehr, 463 U.S. at 260 n.16. Apparently, the marital relationship is the only relationship between the parents that establishes the relationship with the child. In Lehr, for example, the father had lived with the child's mother before the child (Jessica) was born. They were not married, however. After Jessica was born, her mother prevented Lehr from seeing his child. The relationship with Jessica's mother prior to her birth provided no basis for a claim of parental rights or custody of Jessica. Id. at 251, 261.

In establishing a link between father and child, absent marriage, both Lehr and Caban v. Mohammed, 441 U.S. 380 (1979), follow the principle that a mere biological connection with a child is insufficient to create parental rights. "In those cases where the father never has come forward to participate in the rearing of his child, nothing in the equal protection clause precludes the State from withholding from him the privilege of vetoing the adoption of that child." Caban, 441 U.S. at 392. In surrogacy, the commissioning father has "come forward" to participate in rearing the child (to the exclusion of the surrogate in all probability). Whether this attempt is sufficient to create rights in the commissioning party is unclear. In Lehr, the father made sincere efforts to "come forward to participate in rearing his child." Nevertheless, the Supreme Court found that his attempts failed to establish parental rights.

145 See Santosky, 455 U.S. 745, 754.

146 See Lehr, 463 U.S. at 261.
parental status, they implicitly recognized the contractual creation of parental rights.147

C. Focus: The Individual Child or Children in the Aggregate

In Baby M, both courts focused on the particular child before them in the contract action by William Stern. The supreme court expressly rejected Mrs. Whitehead's contention that the need to deter surrogacy should influence its decision.148 In a custody dispute, however, the child's interests are determined by applying a generalization that a child's best interests lie in the custody of a parent. Thus, if William Stern had been deemed a nonparent, the court would have found the child's interests better served by custody with the mother—absent evidence overcoming the presumption. To find otherwise would increase the power of government in an area of life traditionally left free from government interference.149

To support its point that the child's interests rather than deterrence must govern the inquiry, the New Jersey Supreme Court relied on two cases involving payment in connection with adoption: “Use of unapproved intermediaries and the payment of money in connection with adoption is insufficient to establish that the would-be adoptive parents are unfit or that the adoption would not be in the child's best interest.”150 But these cases did not involve a contest between the adoptive parents and the natural mother. Unless the mother is unfit or has relin-
quished her child to another, the test in adoption disputes turns on the fitness of the mother, not on the fitness of the parties seeking to adopt. Despite the desire of both courts in Baby M to effectuate the best interests of the child, the established preference for a natural parent controls the test.

When applying the best interests standard, courts universally prefer custody with a parent—either the legal parent or the psychological parent. In surrogacy, the concept of a psychological parent will not come into play since the custody dispute—if one is to occur—comes before the child has developed a relationship with the commissioning party. Thus, to win a custody case, the commissioning party must gain recognition as a legal parent entitled to parental status and direct comparison with the surrogate.

The concept of equal treatment of individuals similarly situated argues against creation of a special rule that would single out children of surrogacy. To apply a best interests standard in surrogacy without the necessary presumption favoring parental custody puts these children in a class different from others. The use of a special rule that directly compares the commissioning party and the surrogate accepts commodification of these children. The rule applied to the children of surrogacy should be the same applied to all other children. A nonparent should secure primary custody of a child born of surrogacy only when such a nonparent would prevail in a contest for a child not resulting from surrogacy, that is, when he is a psychological or equitable parent. The best interests test should not be used to impose a different standard that gives the nonparent an advantage in the surrogacy context greater than a nonparent would have in other contexts.181

The parental status of litigants in a custody dispute has a profound influence on the application of the best interests test in custody determinations. Concern for the best interests of the child does not justify removal of a child from a fit parent absent unusual circumstances. All jurisdictions consider the parental status of the disputants in deciding which party will best serve the interests of the child. Three potential bases for the commissioning parties' parental status are (1) the creation of parental rights in the surrogacy contract, (2) the constitutional right to procreate and parent, and (3) legislation recognizing such status in the surrogate father. The following parts of this Article examine these

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181 See Mnookin, supra note 49, at 282.
bases as well as the individual's and society's interest in parental status in the surrogate father.

IV. THE CONTRACT

A. As Basis for Parental Status

A surrogacy contract serves the interests of two adults. The commissioning party seeks a child to fill a need. The surrogate wishes to provide the child either as an act of altruism, or as a means of making money (or perhaps both). Neither interest focuses on the needs of the child, however. Resolution of contract issues necessarily focuses on the interests of the parties to the contract: the fairness of their bargain (is each protected from overreaching or fraud?), the presence or absence of misrepresentations, or other irregularities that might invalidate the contract. These considerations are unrelated to the child's best interests and should not be allowed to affect the custody determination.

In surrogacy the parties seek to accomplish by contract three things crucial to custody and parental rights: (1) termination of the surrogate's parental relationship to the child, (2) the voluntary relinquishment of the surrogate's parental rights, and (3) the commissioning party's parental relationship to the child. The question is whether parties can effectively establish these things by agreement. In Baby M, the trial court accepted all three of the contract declarations and enforced the contract. The court did, however, condition the remedy of specific performance on its serving the best interests of the child. The New Jersey Supreme Court avowedly rejected all three declarations and invalidated the surrogate parenting agreement in toto. Nevertheless, it accepted William Stern as a natural parent based on both genetics and the contract. Long-established public policy rejects the right of a parent to sell his or her child. In commercial surro-

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182 See Baby M II, 109 N.J. at 413, 438, 537 A.2d at 1236, 1248.
183 This termination is assertedly accomplished at the time of the child's birth, but the surrogate mother commits irrevocably to the termination prior to conception.
184 The New Jersey Supreme Court held that since the decision to surrender the child is made before the surrogate knows the strength of her bond with the child, her decision cannot be totally voluntary. See Baby M II, 109 N.J. at 437, 537 A.2d at 1248. And, at any rate consent is irrelevant since commercial surrogacy is either a sale of a child or a promise to relinquish parental rights, and, thus, violates public policy. See id. at 437, 537 A.2d at 1249.
185 See Baby M I, 217 N.J. Super. at 390, 525 A.2d at 1166.
186 As to the supreme court's interpretation of the Uniform Parentage Act, see supra notes 53, 57, 100 and accompanying text.
187 See Baby M II, 109 N.J. at 422, 437-38, 537 A.2d at 1240, 1248; Berg v. Catholic
gacy, it is clear that something is sold. Consideration is exchanged for something—either the child, the services of gestation, or relinquishment of parental rights. The New Jersey Supreme Court deemed the contract a sale either of the child or of parental rights. From the perspective of public policy, the question is whether what is sold is something that our society will recognize as marketable—either as a commodity or a service. Although in Baby M, the supreme court rejected the sale of the child or of the parental rights, it implicitly accepted the creation of parental rights by contract.

B. Limitations on Power of Contract

Contract law is primarily an instrument of commercial transfer. It is "concerned with the securing and protection of those economic interests that result from assurances." Contract law arises from promises. By contract, parties transfer property rights and create obligations to act or refrain from acting in prescribed ways. Although the power to contract in our society is far-reaching, it is not unfettered. Some contracts have no effect because they are contrary to law or public policy.


159 Radin, supra note 31, at 1850-51, 1926-31. Even assuming the contract to be for personal services, the court could also have found the contract void as contrary to public policy.

160 Murray on Contracts § 1 at 2 (2d rev. ed. 1974)[hereinafter Murray]. See also P.S. Atiyah, An Introduction to the Law of Contract (3d ed. 1981). Professor Karl Llewellyn describes contract law as "the branch of law which plays primarily into what economists know as the market, the balance wheel of a money economy, the social machine which makes possible our regime of specialization." The Bramble Bush On Our Law And Its Study 10 (1969).

161 Murray, supra note 160, § 2 at 4.

162 The New Jersey Supreme Court found the surrogacy parenting agreement invalid on both these bases. See Baby M II, 109 N.J. at 421-22, 537 A.2d at 1240. Section 178 of the Restatement (Second) of Contracts (1981) provides in part: "A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." By this literal language, the illegality of a contract for the sale of a baby (or a surrogacy contract held to be illegal) would not be the direct basis for refusing enforcement of the contract unless the legislation expressly stated that such contracts are unenforceable, i.e., "legislation provides that it is unenforceable." Rather, a contract to commit an illegal act would be unenforceable on the ground that public policy against enforcement outweighs the interest in enforcement. Enactment of the prohibiting law is a legislative declaration that public policy outweighs the contract interest. See also Restatement (Second) of Contracts §
With respect to the custody of children, for example, contracts are unenforceable if not in the best interests of the child. A contract that constitutes the sale of a child is void as an illegal contract and as contrary to public policy. Parties cannot control facts or legal relationships by agreement. This is not an encroachment by the state on the parties' freedom to contract. A court may always look behind the contract to determine whether an agreement was induced by fraud or whether a party is exempt from the legal effect of fraud. Similarly, a state may limit the power of individuals to create legal relationships by contract. Even though marriage is often spoken of as a contractual relationship, individuals can marry only by fulfilling...
requirements of society and the state. A declaration by the parties that they are married is not sufficient.

The limited power of individuals to establish facts or legal relationships by agreement underlies judicial inquiry in virtually every sphere of law. Even if parties can establish a relationship by their conduct, they are not necessarily able to establish the same relationship by the force of words alone. For example, parties are free to declare that they either are or are not principal and agent in business contracts, such as dealership agreements or contracts of escrow, trust, bailment, and the like. Such a declaration cannot effectively bind a court to accept the declared relationship as established, however. "Mere words will not blind us to realities." The question of agency is a factual one, which the trier of fact must determine when necessary.

A striking example of a statement of facts contrary to a literal declaration occurs in the area of surrogacy in the affidavit of nonconsent. In this affidavit, the surrogate's husband declares that he does not consent to the artificial insemination of his wife. The purpose of the affidavit is to preclude application of the statutory presumption of

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170 For individuals to marry in Tennessee, for example, they must comply with incest restrictions, meet minimum age requirements, have dissolved all prior marriage contracts, and obtain a valid marriage license. See Tenn. Code Ann. §§ 36-3-101 to 103 (1984 & Supp. 1988).

171 Although common law marriage is recognized in several states, no state will recognize a marriage if it falls within the jurisdiction's definition of incest. See, e.g., In re Estate of Stiles, 59 Ohio St. 2d 73, 391 N.E.2d 1026 (1979)(holding common law marriage of uncle and niece is incestuous and void ab initio). See generally, Uniform Marriage and Divorce Act § 207, 9A U.L.A. 157 (1987).

172 In distinguishing between the agency-principal relationship and the sale relationship, Mechem stated that "doubtful cases are to be determined, not by the name which the parties have seen fit to apply to their contract but by its true nature and effect. The essence of sale is the transfer of the title to the goods for a price paid or to be paid." 1 Mechem, A Treatise on the Law of Agency § 48 (2d ed. 1914). See also United States v. General Elec. Co., 272 U.S. 476 (1926); Stansifer v. Chrysler Motors Corp., 487 F.2d 59 (9th Cir. 1973). Similarly, the Restatement (Second) of Agency states:

When it is doubtful whether a representative is the agent of one or the other of two contracting parties, the function of the court is to ascertain the factual relation of the parties to each other and in so doing can properly disregard a statement in the agreement that the agent is to be the agent of one rather than of the other, or a statement by the parties as to the legal relations which are thereby created.

Restatement (Second) of Agency § 1 comment b (1958).


174 Similarly, in contract formation the parties' terminology does not control the decision of the court or jury concerning a fact. That parties refer to a communication as an offer will not prevent a court from finding that it was in fact an invitation for offers or an acceptance. See, e.g., Moulton v. Kershaw, 59 Wis. 316, 18 N.W. 172 (1884).
many states that a child conceived by a married woman through artificial insemination consented to by her husband is the issue of the marriage. The only purpose of the affidavit of nonconsent is to remove the problem that the statute could pose for the commissioning party. The court should regard the cooperation of the surrogate’s husband as clear evidence of his consent to the insemination.

Limitations on the contractual power of individuals may be viewed either as the definite expression of a specific public policy of the relative value of the personal interests at stake or as the consequence of public norms and values. Such limits are vulnerable to the charge of tyranny of the majority no more than other prohibitory or prescriptive law. The requirement of factfinding outside of the powers of the parties is essential to the existence of public norms whether they are expressed as criminal prohibitions, legal relationships, or minimum fairness requirements. If parties could define their legal relationships or their own inclusion or exclusion from particular categories, prohibitions relating to the status of parties would be meaningless.

C. The Judicial Role

However a custody dispute arises (from surrogacy or from more typical circumstances), the court is ultimately responsible for determin-
ing the appropriate custody of the child. In exercising its parens patriae jurisdiction, the court’s duty is to put the child’s interests before the competing interests of the contracting parents. Although courts typically implement custody agreements between parents, they are not bound by them, regardless of the parental or marital status of parties to an agreement. “Whatever the agreement of the parents, the ultimate determination of custody lies with the court in the exercise of its supervisory jurisdiction as parens patriae.” Neither the trial court nor the New Jersey Supreme Court would have given effect to a contractual declaration that the best interests of the baby would be served by custody with the father. A court would insist on exercising its judgment rather than merely enforcing the declaration of the parties. For the court to enforce the parties’ contractual declaration of the child’s best interests without an independent inquiry and judgment would be to abdicate judicial responsibility.

Recognition of parental status based on a contract is also an abdication of the court’s responsibility. Judicial acceptance of the contractual declaration of parental status of parties to a custody dispute usurps the court’s role as surely as judicial acceptance of a contractual declaration of the best interests of the child does. If courts were bound by the contractual declarations regarding parental status, the power of the court to determine the child’s best interests would be significantly curtailed. In a custody dispute, precedent constrains the court to prefer a parent over a nonparent and, if two parents dispute custody, to prefer neither but to compare them in order to determine the best interests of the child.


180 Baby M II, 109 N.J. at 434, 537 A.2d at 1243, 1246.

181 The rule that the court rather than the parties determines custody appears to cut against the finding of the trial court in Baby M I that parties may terminate parental rights. The trial court held that enforcement of the contract required termination of Mrs. Whitehead’s parental rights.

182 See Baby M I, 217 N.J. Super. at 399, 525 A.2d at 1171.

183 That the court might reach the same conclusion as that stated by the parties would not mean it had abdicated its role so long as the court exercised its own judgment of the child’s best interests.

184 The New Jersey Supreme Court noted that the fact that the trial court enforced the contract subject to the best interests of the child could not save the contract from invalidity. Baby M II, 109 N.J. at 435, 537 A.2d at 1246.

185 See Part III of this Article.
If a court adopts the contractual declarations of parental status—accepting the creation and extinguishment of parental status—the parent created by the contract, the commissioning father, would be in competition with a nonparent, the mother whose parental status was extinguished by the same contract. Once these status changes are accepted, an award of custody to the commissioning party is almost certain unless the parental preference for him is overcome.\textsuperscript{186}

The best interests of the child are hardly served by such analysis. Closer scrutiny of the points that contracting parties attempt to establish in a surrogacy contract is important.\textsuperscript{187}

1. \textit{Termination of Parental Rights}

The relationship of parent and child is a \textit{legal} relationship.\textsuperscript{188} In \textit{Baby M}, the New Jersey Supreme Court noted that the legislature retains the power to determine what constitutes a parent-child relationship.\textsuperscript{189} Hence, it is not necessarily subject to terms agreed upon by parties to a contract. It also ruled that prebirth consent to adoption is as ineffective for a child born of surrogacy as it is in other adoptions.\textsuperscript{189}

2. \textit{Voluntariness of Termination}

The New Jersey Supreme Court rejected the power of contracting parties to establish the voluntariness of parental termination.\textsuperscript{191} A declaration of voluntariness would have essentially the same effect as a declaration that no fraud occurred in inducing the contract. Unless the court looks behind the declaration to make a factual determination, the power of the court to enforce public norms is thwarted. Moreover, as the supreme court noted, the consent of the mother, voluntary or not, is irrelevant:

\textsuperscript{186} The commissioning party could be female and genetically related to the child in the case of \textit{in vitro} fertilization and implantation in the surrogate. See supra notes 3 & 5.

\textsuperscript{187} Professor Wadlington suggests expansion of the role of contract law to allow private ordering of parent-child relationships. See Wadlington, supra note 3, at 507-11.

\textsuperscript{188} See J. Cherfas \& J. Gribbin, \textit{The Redundant Male: Is Sex Relevant in the Modern World}? 121-22 (1984). Cherfas and Gribbin rely on studies linking tribal inheritance patterns with the level of promiscuity in a culture for support of their thesis that probable paternity influences inheritance rules in a culture.

\textsuperscript{189} But the New Jersey Supreme Court did not decide this point. Baby \textit{M II}, 109 N.J. at 441-42 n.10, 537 A.2d at 1250 n.10.

\textsuperscript{190} Baby \textit{M II}, 109 N.J. at 422, 537 A.2d at 1240.

\textsuperscript{191} Baby \textit{M II}, 109 N.J. at 440-41, 537 A.2d at 1248-49.
There are, in a civilized society, some things that money cannot buy. In America, we decided long ago that merely because conduct purchased by money was "voluntary" did not mean that it was good or beyond regulation and prohibition. . . . There are, in short, values that society deems more important than granting to wealth whatever it can buy, be it labor, love, or life.  

3. Creation of Parental Status by Contract

Whether the parent-child relationship can be either created or terminated by declaration depends on the rules of the society. It is clear, for example, that parents cannot avoid parental responsibilities (e.g., for support) simply by declaring the relationship terminated. In some circumstances state statutes create the legal relationship of parent and child despite the absence of a genetic link. Statutes presume the paternity of the husband of a child's mother. Such statutes apparently are motivated by a desire to provide a father—and traditionally the primary support—for the child and to preserve the family. Sometimes courts separate parental rights and responsibilities to protect children. When jurisdictions deem a custodian an "equitable parent"
and "psychological parent" (despite the lack of genetic relationship), they accord the same status to both the biological and nonbiological parents. The above examples suggest that the determination of parental rights and status depends on a sometimes complex legal judgment of the interests at stake rather than on the simple genetic or contractual relationship.

D. Comparison of Parties

In a jurisdiction where surrogacy contracts are illegal, both parties—the genetic mother and the genetic father—are arguably in pari delicto, and the contract should not affect the outcome of a custody dispute. This suggests the two should be compared without preference. Although it has appeal, the argument fails to account for the different treatment often accorded the mother and father of illegitimate children.

In the case of a legitimate child, the status of both parents is established at birth. In the case of illegitimate children, however, the law differentiates between the unwed father and the unwed mother. The unwed mother's status is established at birth if she does not abandon the child, but the unwed father's status must be established by his assumption of parental responsibility toward the child.

In at least three cases the United States Supreme Court has scrutinized this distinction and found that disparate treatment of biological fathers and mothers does not constitute invidious gender discrimination when it is based on the parent's relationship with the child. "[T]he existence or nonexistence of a substantial relationship between

that this liability is in no wise affected by the fact that the custody of said children may have been taken away from him by the decree of a court of competent jurisdiction." Boggs v. Boggs, 138 Md. 422, 474, 477 (1921)(quoting Alvey v. Hartwig, 106 Md. 254, 132, 67 A. 132, 135 (1907)).

198 See Lehr v. Robertson, 463 U.S. 248, 266-67 (1983); H. Clark, supra note 97, at 595.


198 Lehr, 463 U.S. at 266-67. The Lehr court also stated:

If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights. Id. at 267-68.

Recently the Arkansas Supreme Court held that even if the illegitimate father has never received notice that he is the father of a child, an adoption could proceed without his consent. See Adoption of S.J.B., 294 Ark. 598, 745 S.W.2d 606 (1988).
parent and child is a relevant criterion in evaluating both the rights of
the parent and the best interests of the child. In Quilloin v. Walcott, the Supreme Court invalidated a Georgia statute that allowed
adoption of an illegitimate child only if the child's mother consented to
the adoption. The state required consent by the father only if he had
legitimated the child. In invalidating the statute as violative of the
equal protection clause, the Supreme Court noted that a statute that
dispensed with paternal consent when the father had formed no rela-
tionship with the child does not violate the fathers' constitutional
rights. In Lehr v. Robertson, the Court refused to accord parental
rights to the father of an illegitimate child despite his attempts to con-
tact the child, holding that in addition to a biological link, acceptance
of parental responsibility is required to establish parental rights. In
both Lehr and Quilloin, the Supreme Court held that a father who
lacks a relationship with his child is not deprived of due process by
denial of parental rights.

In a surrogacy dispute the father probably will not have had an
opportunity to form a relationship with the child. Typically, the dispute
will originate when the surrogate refuses to relinquish custody. The po-
sition of the commissioning party would thus have to be that the neces-
sary acknowledgement of responsibility is achieved by the surrogacy
agreement. Whether a contract that is "illegal, perhaps criminal, and
potentially degrading to women" should be recognized as an assump-
tion of parental responsibility and therefore the crucial link to
parenthood depends on the rights of the individual as well as the laws
of society. If the constitutional right to beget arises without regard to
the legality of the means employed, then the father has a right to due
process before his right to parent a child born of surrogacy is termi-
nated. The illegality of the contract can be a factor only insofar as it
indicates the unfitness of a parent and thus the right of the state to
terminate parental rights. If the constitution does not protect the right
to beget through a surrogate, then a state need not recognize a parental
right in the genetic father of a child born of surrogacy. The commis-
sioning party who seeks custody would stand as a stranger to the child

199 Lehr, 463 U.S. at 266-67.
200 Quilloin, 434 U.S. at 256.
201 Lehr, 463 U.S. at 266-68.
202 Id. at 267-68. See Part V of this Article for a discussion of the relevance of the Lehr case
to a claim of parental rights in the surrogacy context.
203 Baby M II, 109 N.J. at 411, 537 A.2d at 1234.
unless he has been able to establish a parental relationship with the child.

Traditionally, the law has accorded parental status to the mother of an illegitimate at the child's birth.\(^{204}\) If a state considers the maternal relationship as developing during the period of gestation in which the mother nurtured the developing child and refrained from terminating the pregnancy, it may determine that a parent-child relationship is established at birth. In such a case, the illegal conduct appears relevant only to the question of whether to terminate the parental rights of the mother\(^{205}\) or whether the evidence overcomes the presumption that custody with the mother protects the child's best interests.\(^{206}\)

Surrogacy may also require that courts determine the reasons for

\(^{204}\) *Lehr*, 463 U.S. at 266.

\(^{205}\) To terminate parental rights, unfitness must be shown by clear and convincing evidence. See *Santosky v. Kramer*, 455 U.S. 745, 769 (1982). It is conceivable that the illegal contract to relinquish the child could be convincing evidence of unfitness—especially if the woman has entered into more than one such contract.

In the related area of black market sales and adoptions, New Jersey has held that unfitness is not necessarily established by the purchase of a child, or by the fact that prohibited payments are made in connection with the adoption of a child. See *In re Adoption of a Child by I.T. and K.T.*, 164 N.J. Super. 476, 397 A.2d 341 (1978); *In re Adoption of a Child by N.P. and F.P.*, 165 N.J. Super. 591, 398 A.2d 937 (1979). Such cases have not presented the issue whether the sale as opposed to purchase of a child establishes unfitness. Nor have the cases involved a custody dispute between the parent of the child and the adopting parent.

\(^{206}\) When the presumption in favor of a parent is overcome, custody may be awarded to a nonparent without termination of parental status. See *Mnookin*, supra note 49, at 239-40. The constitutional safeguards that attach when a nonparent seeks custody despite a parent's desire for custody are unclear. The United States Supreme Court has not explored what showing, if any, could justify an award of custody to someone other than a parent when the decision does not terminate the parent's rights. See *Santosky*, 455 U.S. 745. The New Jersey Supreme Court declined to address two issues relevant here: (1) whether a decision giving custody to the Sterns and no visitation rights to Mrs. Whitehead would amount to a termination of Mrs. Whitehead's parental rights (see *Baby M II*, 109 N.J. at 451, 537 A.2d at 1255); and (2) whether termination of parental rights would be justified in the surrogacy setting (see id. at 452-53 n.16, 537 A.2d at 1255-56 n.16 ("We do not believe it would be wise for this Court to attempt to identify various combinations of circumstances and interests, and attempt to indicate which combinations might and which might not constitutionally permit termination of parental rights.")).

Although the quantum of evidence necessary to overcome the parental presumption varies among jurisdictions, some jurisdictions require clear evidence. See, e.g., *Newman v. Sample*, 205 So. 2d 650 (Miss. 1968); *In re Guardianship of Hight*, 194 Okla. 214, 148 P.2d 475 (1944). Other courts describe the standard of proof as clear and conclusive, see *In re Sweet*, 317 P.2d 231 (Okla. 1957), or plain and certain, see, e.g., *Pierce v. Jeffries*, 103 W. Va. 410, 137 S.E. 651 (1927); Annotation, Right of Mother to Custody of Illegitimate Child, 51 A.L.R. 1507 (1907). Finally, some courts have held that a preponderance of the evidence overcomes the presumption that child's best interest mandate parental custody of a parent. See *In re Perales*, 52 Ohio St. 2d 89, 369 N.E.2d 1047 (1977). Even in such a case, the presumption is something more than a comparison of the parent and the nonparent.
the difference in treatment of parental rights in illegitimate children. If
the mother's genetic link to the child is the basis for according her
parental status, there appears to be no basis for preferring her over the
genetic father. If, on the other hand, the special status of the mother is
granted in recognition of her biological relationship—of nurturing the
child during gestation and laboring for its birth, then a basis for prefer-
ring the mother exists. The reason for such recognition is even more
important in cases where the surrogate is not the genetic mother of the
child.

The New Jersey Supreme Court assumed that William Stern was
entitled to parental status for the determination of custody of his ge-
genetic child. This status, however, need not be recognized any more than
contractual relinquishment of parental rights. A state may refuse to
recognize parental status despite the genetic link. The traditional
means of achieving parental status are marriage, adoption, or paternity
action. The dangers of contractual creation of parental rights are not as
obvious as those attending the relinquishment of rights prior to birth.
Effectuating such a contract may commodify human relations signifi-
cantly. It allows a prebirth compromise of the mother's rights in her
child for pay. Although the New Jersey Supreme Court refused to ac-
cept a prebirth relinquishment—especially one for payment—it as-
sumed that creation of a parental right in this manner is unavoidable.
The court should have addressed directly whether creation of parental
rights by contract poses the same dangers of commodification as does
the contractual extinguishment of rights.

E. The Contract as a Basis for Specific Performance

Even if a jurisdiction deems the surrogacy contract to establish the
parental status of the commissioning party, the court must decide
whether specific performance should be available to enforce the surro-
gate's promise to relinquish the child\textsuperscript{207} or other promises.\textsuperscript{208} In the

\textsuperscript{207} See Baby M II, 109 N.J. at 450, 537 A.2d at 1254-55. In Baby M I, the trial court
followed this analysis, holding that the contract was valid and then considering whether the rem-
edy of specific performance was appropriate. Then in this context the trial court conditioned the
enforcement of the contract on serving the best interest of the child. See Baby M I, 217 N.J.
Super. at 390, 525 A.2d at 1166.

\textsuperscript{208} The surrogate contract typically includes at least four promises by the surrogate: (1) to
consent to be artificially inseminated with the semen of the contracting father; (2) to carry any
resulting fetus until delivery; (3) to refrain from aborting the fetus; and (4) to relinquish custody
and all parental rights to the child. Additionally, the surrogate often promises to subm to an
abortion when so required by the contracting father (generally as a result of a medical determina-
ordinary noncommercial setting, such as a custody dispute, courts do not enforce contracts that do not serve the child's interests. To grant specific performance of a commercial surrogacy contract is to grant a commercial remedy in a noncommercial setting—at best an inconsistent position. Thus, courts should not enforce by specific performance promises made in the surrogacy agreement.

V. THE CONSTITUTION

In Baby M, the trial court based its decision terminating all parental rights of Mrs. Whitehead on the contract itself, on a finding that termination was in the best interests of the child, and on a conclusion that the constitution protects the right to procreate through a surrogate. Although the New Jersey Supreme Court acknowledged the existence of a fundamental right to the companionship of one's child, it did not rely on state or federal constitutional standards to invalidate the termination of Mrs. Whitehead's parental rights. Rather, it used statutory law and public policy to reverse the termination and thus held her constitutional claim moot.

A thorough assessment of the constitutional implications of surrogacy is not possible here, but a brief discussion of the various constitutional arguments is necessary to determine whether parental status is properly viewed as an issue of public policy. If surrogacy is a constitutional right public policy and contract law arguments become mere academic inquiries. Surrogacy presents two separate constitutional is-

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209 See H. CLARK supra note 97, at 590.
210 For examples of these promises, see Baby M II, 109 N.J. at 470-73, 537 A.2d at 1265-68 (Appendix A, Surrogate Parenting Agreement); Brophy, A Surrogate Mother Contract to Bear a Child, 20 J. FAM. L. 263, 271-72 (1981-82); N. KEENE & D. BREO, supra note 29, 275-306.
211 Baby M I, 217 N.J. Super. at 389-90, 525 A.2d at 1166.
212 The trial court held that invalidation of surrogacy arguably was justifiable only when the state interest in invalidation was compelling. See Baby M I, 217 N.J. Super. at 386, 525 A.2d at 1161.
214 Baby M II, 109 N.J. at 450, 537 A.2d at 1255.
215 The constitution protects the right to contract from state action that would deny this right without due process. See generally Flagg Bros., Inc., v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Shelley v. Kraemer, 334 U.S. 22 (1948). See also Baby M II, 109 N.J. at 451 n.15, 537 A.2d at 1255 n.15. Whether refusal to enforce a contract constitutes state action is questionable. In Flagg Bros., the Supreme Court rejected the argument...
sues: (1) whether the constitutional right to procreate extends to the use of the body of another (the surrogate) and (2) whether the genetic parent of a child has a constitutional right to be treated as a parent for purposes of a custody dispute. The first issue is complicated by the question whether these rights, if cognizable, inhere regardless of or only because of a genetic relationship with the child.

An affirmative decision on the first question seems to require an affirmative answer on the second. If a person has the right to use a surrogate, a court in a custody dispute between the surrogate and the commissioning party would have to compare the surrogate and the commissioning party both as parents. A negative decision on the first question does not require a negative on the second, however. Even if no constitutional right to use a surrogate exists, the constitutional right to parent one’s existing offspring is an entirely separate question. A court could reject a constitutional right to use a surrogate and yet recognize a constitutional interest in being treated as a parent for custody purposes. Indeed, in Baby M, the New Jersey Supreme Court made this distinction in rights, although not on a constitutional basis.218

Both proponents and opponents of surrogacy rely on the federal constitution for their argument.217 Opponents argue that the surrogate has a constitutional right to the companionship of the child she has borne. Proponents argue that the constitution requires courts to enforce surrogacy contracts as an incident of the commissioning party’s right to procreate or to justify a refusal to enforce such right by a compelling state interest.218 The constitution does not support, however, the eleva-
tion of one individual's rights over those of another.

A. Basis for Contract Enforcement

If the right to procreate includes a right to use the body of another who consents to that use, then the constitution would require enforcement of the agreement through which this constitutional right is exercised, absent a compelling state interest against enforcement.219 This was one basis for the trial court decision in Baby M.220

For several decades, United States Supreme Court decisions have extended special protection to rights involving procreation and the family unit. In Santosky v. Kramer,221 the Supreme Court noted its "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest."222 The Supreme Court has recognized fundamental privacy rights in family and sexual matters in several contexts: the right to marry;223 the right to bear and beget children;224 the right to decide whether to bear a child;225 and the right to procreate.226 But for several reasons, such protection does not properly extend to the use of governmental power to enforce surrogacy contracts.

Fundamental rights are not absolute, nor do they exist in a vacuum.227 They are limited by considerations of the constitutional rights of others.228 In the context of surrogacy, the conflicting rights of both

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219 See Robertson, Embryos, supra note 65, at 961-62.
220 See Baby M I, 217 N.J. Super. at 386, 525 A.2d at 1153.
221 455 U.S. 745 (1982).
222 Id. at 753.
227 See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1305 (2d ed. 1988). Traditionally the United States Supreme Court has endorsed fundamental values of our society and refused to find fundamental rights in conduct that offends the Court's view of basic liberties, see Meachum v. Fano, 427 U.S. 215, 230 (1976)(Stevens, J., dissenting), and in some cases, the Court's view of conventional morality, see Lehr v. Robertson, 463 U.S. 248, 257 (1983)("State laws almost universally express an appropriate preference for the formal family."). See also Bowers v. Hardwick, 478 U.S. 186, 196 (1986)(federal Constitution does not confer upon homosexuals a fundamental right to engage in sodomy); Lovisi v. Slayton, 539 F.2d 349 (4th Cir.) cert. denied, sub nom., Lovisi v. Zahradnick, 429 U.S. 977 (1976)(Federal protection of privacy dissolves when a married couple admits a third person into the marital bedroom as an onlooker.).
228 See Prince v. Massachusetts, 321 U.S. 158, 177 (1944)(Jackson, J., concurring)(limits on
the surrogate and the commissioning party are implicated. These include the surrogate's right to procreate and parent, the right to choose to terminate a pregnancy, and the right to be free from intrusions on other liberty interests such as freedom from forced insemination. Surrogacy proponents maintain that by agreeing to relinquish these rights the surrogate has waived or sold her constitutional right to parent the child. But the universal refusal to enforce prebirth consent to adoptions as a matter of public policy is recognition of a surrogate's inability to waive parental rights prior to the birth of a child.

As a general rule, a person should be accorded the right to make decisions affecting his or her own body, health, and life, unless that choice adversely affects others. In the present case, the parties' right to procreate by methods of their own choosing cannot be enforced without consideration of the state's interest in protecting the resulting child, just as the right to the companionship of one's child cannot be enforced without consideration of that crucial state interest.


See Santosky, 455 U.S. at 753. The trial court tried to meet the Santosky standard by finding that the various factors relating to the best interests of the child were established by clear and convincing evidence. See Baby M I, 217 N.J. Super. at 396, 525 A.2d at 1169-70. The court found "by clear and convincing proofs that Mrs. Whitehead is unreliable insofar as her promise is concerned," id. at 396, 525 A.2d at 1169, and was "satisfied by clear and convincing proof that Mr. and Mrs. Stern wanted and planned for this child," id. at 397, 525 A.2d at 1170. The court concluded: "we find by clear and convincing evidence, indeed by a measure of evidence reaching beyond reasonable doubt, that Melissa's best interests will be served by being placed in her father's sole custody." Id. at 398, 525 A.2d at 1170 (emphasis added).

None of these findings, however, meet the constitutional requirement that parental rights be terminated only on a finding of unfitness based on clear and convincing evidence. See Baby M II, 109 N.J. at 451 n.14, 537 A.2d at 1255 n.14 (citing Santosky, 455 U.S. 745). The supreme court found no evidence to justify termination under the statutory standard because "obviously there was no 'intentional abandonment or... neglect of parental duties.'" Id. at 445, 537 A.2d at 1252 (citations omitted). It noted that "the trial court never found Mrs. Whitehead an unfit mother and indeed affirmatively stated that Mary Beth Whitehead had been a good mother to her other children." Id.


Neither court addressed the question whether retention of minimal rights in a parent allows a court to grant custody to a nonparent without affording any sort of preference to the parent in a dispute. The implication of Santosky, 455 U.S. 745, is that a parent is entitled to protection against any arbitrary termination of the right to parent, rather than only against complete termination of all parental rights.

See Stark, Constitutional Analysis of Baby M Decision, 11 Harv. Women's L.J. 19, 38 (1988)(surrogate cannot irrevocably waive decisional rights). In Law and Morals, Lee Simon suggests that government may properly restrict an individual's choice when the restriction will enhance his or her autonomy in the long run.

If we regard freedom or liberty or autonomy as something existing over time, and if Mill's aim is to increase our autonomy overall, it might well be the case that a short-
Further, the constitutional protections that comprise the right of privacy are rooted in personal rather than economic freedom. The fundamentally personal nature of the right to privacy and the rejection of any economic facets to the right was present in the genesis of this right. In *Griswold v. Connecticut*, the United States Supreme Court protected the right to privacy in marital decisions to use contraceptives, stating that marriage "promotes a way of life, not causes; a harmony in living, not political faiths; and a bilateral loyalty, not commercial or social projects."*284* The Court has recognized a corresponding right to privacy for unmarried individuals engaged in interpersonal as opposed to economic relationships. Nothing supports the exercise of procreative rights in a commercial enterprise as a protected activity, however. *Roe v. Wade* established the right of a woman to secure an abortion during the first trimester of pregnancy, but in *Roe* the Supreme Court expressly refused to endorse the concept that "one has an unlimited right to do with one's body as one pleases."*286* Nothing in the expression of one's right of privacy suggests that the right extends to abortion as part of a commercial enterprise. Fetal tissue is now used for treatment of Parkinson's and other diseases,*287* but this does not mean that a woman exercises her right of privacy when she becomes pregnant in order to harvest and sell her aborted fetus for medical research or treatment. The right of privacy does not protect the use of personal rights for commercial purposes.

The dichotomy of economic and personal rights governs the most basic classifications of rights. Commercial surrogacy falls in the eco-

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nomic rights category\textsuperscript{238} rather than the personal rights category. The right of privacy includes consensual sexual relations between marriage partners. One can not make a serious argument that the right to privacy protecting sexual relations from government interference extends to intercourse with a prostitute. Even if the act is the same as that between married persons, the commercial nature of the intercourse brings it within the state power to regulate or prohibit without objection that the constitutional rights of either the prostitute or the client are violated.\textsuperscript{239} This analysis suggests that a state may constitutionally prohibit surrogacy. It also suggests that a state could choose to deter surrogacy by refusing to grant "natural parent" standing to the commissioning party despite a biological link.

Some scholars maintain that because the constitution protects reproductive choices such as contraception, abortion, and childbearing, it also secures the ability to exercise a protected option.\textsuperscript{400} Thus, they argue that infertile couples have the right "to avail themselves of a willing surrogate to provide the missing uterine function."\textsuperscript{241} But the concept of equal protection does not extend so far. Although government may not interfere with the exercise of constitutional rights, government refusal to enable an individual to exercise those rights does not violate the Constitution.\textsuperscript{242}

B. Basis for Parental Status

Even if no constitutional right to use a surrogate exists, a commissioning party who is genetically related to the child might have a constitutional right to parental status in a custody dispute.\textsuperscript{243} In \textit{Lehr v. Robertson},\textsuperscript{244} the United States Supreme Court explored the question

\textsuperscript{238} See \textit{Griswold}, 381 U.S. at 482.

\textsuperscript{239} Some recognition of right of privacy has been accorded sexual and family interests in relationships outside marriage. Extension of such rights to the commercial sphere would involve a dramatic change in the analysis of rights since it would merge the area of personal rights traditionally afforded special protection with commercial rights, an area historically regarded as within the state's police power.

\textsuperscript{400} \textit{Robertson, Surrogate Contracts, supra} note 29, at 332.

\textsuperscript{241} \textit{Id.}


\textsuperscript{243} This was the situation in \textit{Baby M}. It is the strongest case for recognition of a parental right in surrogacy: a parent who is genetically related to the child. But a limitation on surrogacy that would allow a parental right only for the genetic parent may violate the equal protection clause. \textit{See supra} note 68 and accompanying text; \textit{see generally} Part II \textit{A} of this Article.

\textsuperscript{244} 463 U.S. 248 (1983).
of what recognition the state is required to afford a genetic parent. The issue in Lehr was whether New York sufficiently protected an unmarried father's right to a parental relationship with his offspring.\textsuperscript{245} Jonathan Lehr challenged the constitutionality of a New York statute under which a New York court entered an adoption order for Lehr's illegitimate daughter, Jessica, without affording him notice or an opportunity to be heard. Before Jessica was born, appellant Lehr and the child's mother both acknowledged that Lehr was her father.\textsuperscript{246} Lehr visited the mother and daughter in the hospital after the child's birth.\textsuperscript{247} According to Lehr, the child's mother frustrated his attempts to form a relationship with the child.\textsuperscript{248} Lehr filed a petition in family court seeking a declaration that he was the child's father.\textsuperscript{249} Despite his paternity petition, the New York Court gave Lehr no notice of an adoption proceeding filed by the man Jessica's mother had married. The statute controlling adoption required notification of a putative father only when he fell into one of seven classifications of putative fathers who had somehow declared or assumed responsibility for the child.\textsuperscript{250} The Supreme Court held that the Constitution did not require the state to give Lehr notice or an opportunity to be heard in the adoption proceeding. It reasoned that a genetic link with a child is not in itself sufficient to establish parental status. "Parental rights do not spring full-blown from the biological connection between parent and

\textsuperscript{245} Id. at 249-50.
\textsuperscript{246} Id. at 269 (White, J., dissenting).
\textsuperscript{247} Id. at 252.
\textsuperscript{248} According to Lehr, from the time Lorraine was discharged from the hospital until August 1978, she concealed her whereabouts from him. During this time Lehr never ceased his efforts to locate Lorraine and Jessica and achieved sporadic success until August 1977, after which time he was unable to locate them at all. On those occasions that he did find Lorraine, he visited with her and her children to the extent she would permit it. When Lehr, with the aid of a detective agency located Lorraine and Jessica in August 1978, Lorraine was already married to Mr. Robertson. Lehr asserts that at this time he offered to provide financial assistance and to set up a trust fund for Jessica, but that Lorraine refused. Lorraine threatened Lehr with arrest unless he stayed away, and she refused to let him see Jessica. Id. at 269 (White, J., dissenting).
\textsuperscript{249} Id. at 252.
\textsuperscript{250} Id. at 263. At the time of Jessica's adoption, the classifications provided for by New York law included any person who has been: (1) adjudicated to be the child's father by a New York court; (2) has been declared the father by a court of another state when a certified copy of the order is filed with the putative father registry; (3) has filed a notice of intent to claim paternity of the child; (4) is recorded on the child's birth certificate; (5) is openly living with the child's mother and holding himself out as father at the time of the proceedings; (6) has been identified by the child's mother as the father in a written, sworn statement; or (7) has married the child's mother within six months after the child's birth. Id. at 251-52 n.5 (quoting N.Y. DOM. REL. LAW §§ 111-a (2) & 111-a (3)(McKinney 1977 & Supp. 1982-83).
child. They require relationships more enduring," namely that the father shouldered some of the burdens of parenthood. "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by com[ing] forward to participate in the rearing of his child, . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause." The Court made a relational or familial link rather than a genetic link the significant factor deserving protection. The "mere existence of a biological link does not merit equivalent constitutional protection."

Traditionally, the primary way of demonstrating parental commitment has been to show a familial relationship created by marriage. Like the issue of parental rights in illegitimate children, the question of parental rights in surrogacy arises by definition only when the parents are not married to each other. The Court stated that in illegitimacy, the "absence of a legal tie with the mother may appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children." In a surrogacy arrangement the commissioning party has attempted to establish a relationship of responsibility toward the child by entering a contract. Thus, whether parental rights are created in the commissioning party depends on whether such rights can arise from a commercial agreement. This question necessarily includes consideration of the contract through which parental status is sought.

Not every act undertaken as an attempt to accept and demonstrate a commitment of responsibility is sufficient to meet the Lehr standard.

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251 Lehr, 463 U.S. at 260 (quoting Caban v. Mohammed, 441 U.S. 380, 397. (1979)).
252 Id. at 261 (quoting Caban, 441 U.S. at 392).
253 Id.
254 Caban, 441 U.S. at 392.
255 The contract establishes the responsibility of support for the child in Mr. Stern. In some cases, the additional factor of a genetic link is present. But it is doubtful that this relationship can be required consistent with equal protection requirements. See Part II of this Article.
256 If they (Mr. Stern and Mrs. Whitehead) had had a conventional relationship before the child's birth, then Mr. Stern would have had some claim to custody of the child without relying on any formal contractual document that they had signed. Even if Mr. Stern and Mrs. Whitehead had never been married, Mr. Stern could seek custody of the child, or at least visitation rights, by demonstrating in court that the child's "best interests" would thereby be served. . . . [H]owever, the court must take account of the highly unusual character of the relationship that Mr. Stern and Mrs. Whitehead entered that produced this child.

If, for example, the contract entered into by the genetic parents grew out of rape, fraud, or coercion, the constitution would not require that protected parental status be accorded the father even if he sought to establish a parental relationship with the child. Additionally, apart from such unconscionable acts, the commercial nature of the contract raises the question of whether the commitment merits constitutional protection. *Lehr* does not stand for the proposition that a man’s genetic parentage plus sincere attempts to establish a parental relationship with one’s offspring creates constitutionally protected parental status. Indeed, as the dissent in *Lehr* pointed out, Lehr had done everything he thought he could to locate the child and establish a relationship.\(^5\)

In surrogacy, the commissioning party has “sought to establish a relationship with the child” by means of an agreement with the mother, even though he may have had no contact with the child.\(^5\)\(^8\) The purchasing father may argue that constitutional protection of his right to parent requires that he be given the opportunity to form such a relationship. But the majority opinion in *Lehr* required, in addition to the biological link, some conduct indicating parental responsibility. The dissent faulted the *Lehr* majority for requiring more than a biological connection to attach the panoply of due process protections to parents’ rights:

The “biological connection” is itself a relationship that creates a protected interest. Thus the “nature” of the interest is the parent-child relationship; how well developed that relationship has become goes to its “weight,” not its “nature.” Whether Lehr’s interest is entitled to constitutional protection does not entail a searching inquiry into the quality of the relationship but a simple determination of the fact that the relationship exists—a fact that even the majority agrees must be assumed to be established. Even accepting the view of the dissent, the sale of a claim in a child does not have to be constitutionally protected. Despite the absolute nature of the biological test stated by the dissent, that test need not protect a purchasing party in a commercial surrogacy agreement. Irrespective of the soundness of the dissent’s arguments, *Lehr* arose in the context of a sexual relationship between the child’s mother and putative father . . . \(^5\)\(^8\)

\(^5\) *Lehr*, 463 U.S. at 271 (White, J., dissenting). Similarly, in *Baby M* the commissioning party, William Stern, had done all he could to establish a relationship with his offspring.

\(^5\)\(^8\) Some surrogacy contracts include a provision to allow the purchasing father to abrogate responsibility in the event the child is not defect free or to require an abortion if a defect is discovered during pregnancy. See generally, Burt, *supra* note 256, at 328. Such provision raises the question whether a qualified promise is a sufficient expression of intent by the father to establish an unequivocal relationship of responsibility for his offspring.

\(^5\) *Lehr*, 436 U.S. at 272. It is doubtful, however, that the dissent would apply its rule of biology to all facts. Though the parents in *Lehr* were not married, they did enter a consensual
This was an interpersonal rather than a commercial relationship. Although Lehr does not clarify just how a biological father achieves the requisite parental relationship, commercial surrogacy is antithetical to the family model that is the focus of the constitutional right of privacy.

The dissent in Lehr stressed that the mother’s actions prevented the father from forming a relationship with the child, and thus, the absence of a relationship did not justify the denial of the father’s parental rights. “This case requires us to assume that Lehr’s allegations are true—that but for the actions of the child’s mother there would have been the kind of significant relationship that the majority concedes is entitled to the full panoply of procedural due process protections.” The majority opinion did not respond directly to this argument. It distinguished between “a mere biological relationship and an actual relationship of parental responsibility.” Implicit in the majority’s approach is a judgment that the protection of the due process clause against government intrusion does not require that the state afford opportunities for the father to form a relationship with his illegitimate child. The filing of the filiation proceeding was deemed insufficient either to establish the relationship or to require delay of the adoption proceedings to give the father time to establish a legal relationship with the child.

The basis of the Supreme Court’s analysis of the right to parent is personal, not economic, freedom. No constitutional right secures family relationships by purchase. Hence, the constitution does not require the commissioning party to be treated as a natural parent entitled to the status of the surrogate in a custody dispute. As Lehr established, a genetic relationship alone does not confer this status. In surrogacy the commitment of responsibility to the child results from a commercial transaction that secures the birth of a child for the benefit of the commissioning party. To recognize parental status through a commercial contract would ignore the line between personal and economic freedom that the Court has drawn in order to define regulatory powers of government.

personal relationship that included sexual intercourse. See supra note 57.

Lehr, 463 U.S. at 271 (White, J., dissenting).

Id. at 259-60.

If Lehr had succeeded in his filiation action before adoption had begun, or if he had filed in the putative father registry, he would have established a relationship of responsibility recognized by the state.

VI. PUBLIC POLICY CONSIDERATIONS

If freedom of contract and constitutional principles neither compel nor prohibit recognition of surrogacy, the states may decide whether and to what extent to allow surrogacy according to policies made for the general welfare. Thus, state legislatures and courts will be called on to determine whether such recognition preserves or violates the state's public policy. This part of this Article will present public policy considerations that states will address in deciding whether to enforce a surrogacy contract or to recognize the parental status of the commissioning party when a surrogacy agreement results in a custody dispute.

In Baby M, the New Jersey Supreme Court assumed that the state parentage law required comparison of William Stern and Mary Beth Whitehead as "natural parents" in a custody dispute. Despite its clear rejection of surrogacy as illegal and perhaps criminal, the supreme court's holding conferred parental status based on a commercial transaction. As an expression of public policy, the supreme court decision in Baby M encourages some to use surrogacy to obtain children. While denying a right to purchase a child, the supreme court allowed the acquisition of parental status by a contract that violates public policy.

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364 Although Lehr held that the constitution does not require that states recognize parental rights in illegitimate fathers, the Court also acknowledged that the state may choose to protect the rights of illegitimate fathers.

365 Surrogacy contracts could be accorded weight either as creating a contract right in the commissioning party or only indirectly affording the commissioning party parental status in a custody dispute.

366 Comment, supra note 15, at 142-43. In Lehr, the Supreme Court noted that state law controls in the "vast majority" of cases involving family matters. 463 U.S. at 256.

367 In Baby M II, the court observed that its decision did not "preclude the Legislature from altering the current statutory scheme, within constitutional limits, so as to permit surrogacy contracts." 109 N.J. at 411, 537 A.2d at 1235.

368 Baby M II, 109 N.J. at 411, 537 A.2d at 1235.

369 The acquisition of parental rights in Baby M was not, strictly speaking, a purchase since the court invalidated the contract payment. It was, however, the result of an intended purchase. Moreover, it is clearly foreseeable that when future custody disputes arise from surrogacy, they will result from commercial transactions that have gone awry. Both proponents and opponents of surrogacy agree that the availability of a surrogate generally depends on the offer of payment. See, e.g., Katz, supra note 4, at 13; Keane, supra note 28, at 156; Note, Litigation, supra note 3;
A commissioning party in New Jersey now purchases a chance. If the surrogate performs the contract, the commissioning party may pay the contract price and receive a child.\textsuperscript{270} If the surrogate balks, the purchaser has a chance to secure the child through a custody action.\textsuperscript{271} And if the commissioning party is deemed a parent, he has at least as good a chance of winning primary custody as if he had married the mother of the child. Indeed, his chances may be better. The trial judge may well identify and sympathize more with the father than with the surrogate. The judge will likely be from the same social and economic background as the father and will likely empathize with the father's need and ultimate decision to employ a surrogate—rather than with the surrogate's decision to fill that role.\textsuperscript{272} Applying the flexible and subjective test of the best interests of the child, a judge is more likely to deem the father the better parent compared to a surrogate than compared to his wife.\textsuperscript{273}

But whether parental status should be accorded a commissioning party cannot be answered without considering the strength of the public policy concerning surrogacy. Legislatures and courts must weigh surrogacy in light of important prohibitions against (1) child selling and (2) prebirth consent to adoption.\textsuperscript{274} One could argue that these prohibitions are aspects of a single policy that seeks to prevent creation of a commercial market in children. The first prohibition makes the sale of a child a crime. The second invalidates all prebirth transfers, regardless of whether consideration was paid.\textsuperscript{275} Since recognizing pa-

\textsuperscript{270} Even if the surrogate delivers the child, in New Jersey based on the Baby M decision the commissioning party may well refuse to make the promised payment. See Baby M II, 109 N.J. at 421-22, 537 A.2d at 1240. It is unlikely that the surrogate could prevail in an action for price. Whether this conduct by the commissioning party might affect the court's determination of the best custodial parent is unclear.

\textsuperscript{271} In this situation the commissioning party probably can save the amount promised as payment since the court will invalidate the contract. See Baby M II, 109 N.J. at 422, 537 A.2d at 1241 ("entire contract is unenforceable").

\textsuperscript{272} In a similar situation, the "gray market" for purchase of babies, some courts have held that payment for a child does not render a parent unfit even though such payment is a violation of the laws of the state. See In re Adoption of a Child, 164 N.J. Super. 476, 397 A.2d 341 (1978); In re Adoption of a Child, 165 N.J. Super. 591, 398 A.2d 937 (1979).

\textsuperscript{273} See Mnookin, supra note 49, at 238-40.

\textsuperscript{274} The New Jersey Supreme Court relied on both prohibitions as separate and independent grounds for its invalidation of the agreement. See Baby M II, 109 N.J. at 423, 537 A.2d at 1240.

\textsuperscript{275} For this discussion, we need not explore whether a prohibition makes an act—such as transfer of a child for consideration—a crime or simply renders a promise to perform the act unenforceable. In either case, a finding that surrogacy contracts fall within such prohibitions will
rental status in the commissioning party encourages surrogacy, legislatures and courts should deny parental status in custody disputes if they view surrogacy as a form of child selling or as a circumvention of the laws against prebirth consent to adoption.\textsuperscript{278}

\section*{A. Comparison with Child Selling}

Every state in the United States prohibits baby selling.\textsuperscript{277} In fact, our society prohibits selling humans of any age.\textsuperscript{278} Of course, in some circumstances, courts have enforced contractual custody agreements between parents or between a parent and a relative when the court determined that the agreement was motivated by concern for the child, was intended to benefit the child, and was in the best interests of the child.\textsuperscript{279} But any transaction that in substance amounts to the sale of a child is prohibited.\textsuperscript{280}

If surrogacy so commercializes a child as to constitute the sale of a child, the long-established policy against child selling should prohibit render the contracts unenforceable. \textit{See Restatement (Second) of Contracts § 178 (1981).} The New Jersey Supreme Court found it unnecessary to decide whether surrogacy constituted the crime of child selling. It noted that the conduct was "perhaps criminal" and held the contract unenforceable and illegal. \textit{Baby M II}, 109 N.J. at 422, 537 A.2d at 1240.

\textsuperscript{278} These laws protect the right of the mother to meet her child before she gives that child up for adoption.

commercial surrogacy. To distinguish surrogacy from child selling, surrogacy proponents argue (1) that the contract is essentially one for the personal service of gestation of a child—typically the genetic offspring of the commissioning party, and (2) that legislation against baby selling predated the practice of surrogacy and could not be intended to prohibit surrogacy.

1. Personal Services Contract

The contract between Mary Beth Whitehead and William Stern expressly stated that Stern’s payment of $10,000 was “compensation for services” and not “a fee for the termination of parental rights” or for “consent to surrender the child for adoption.” The trial court accepted this designation, but the supreme court found that the contract was in substance either a sale of a child or a sale of parental rights and held it illegal in either case.

While gestation and childbirth are undeniably work, the purpose of the contract is not to secure a service but to obtain the end product—a child. The services provided in the surrogate contract include allowing insemination, carrying the child during gestation, and delivering the child. These are production services; their sole purpose is to produce the desired product. In fact, most surrogacy contracts provide

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282 The trial court in Baby M construed the surrogate parenting agreement as a contract for personal services:

The law of adoption in New Jersey does prohibit the exchange of any consideration for obtaining a child. The fact is, however, that the money to be paid to the surrogate is not being paid for the surrender of the child to the father. And that is just the point—at birth, mother and father have equal rights to the child absent any other agreement. The biological father pays the surrogate for her willingness to be impregnated and carry his child to term. At birth, the father does not purchase the child. It is his own biological genetically related child. He cannot purchase what is already his. Baby M I, 217 N.J. Super. at 372, 525 A.2d at 1157. Professor Means provides the historical answer to this question; he explains that before the prohibition against involuntary servitude a father could and did purchase his own genetic offspring. See Means, supra note 278, at 447-48.

283 "It is submitted that at the time that even the most current adoption laws were adopted, no thought or consideration was given to the law’s effect or relevance to surrogacy. Surrogacy was not a viable procreation alternative and was unknown when the laws of adoption were passed.” Baby M I, 217 N.J. Super. at 372, 525 A.2d at 1157.

284 See Baby M II, 109 N.J. at 423-24, 537 A.2d at 1241. See Part II of this Article, which discusses the ineffectiveness of the parties’ designation of or labels to a contract.

285 Baby M II, 109 N.J. at 422, 537 A.2d at 1240.
only a small payment if the child is lost by miscarriage or still birth.\textsuperscript{286} The surrogate performs the same service whether the child lives or dies. Yet the surrogate who bears a stillborn child ordinarily gets less than half the amount promised for delivery of a living child. This is evidence of the “goods” nature of the transaction.\textsuperscript{287} The final promise to be performed (delivery and relinquishment of custody) is not a personal service unless every delivery of goods also constitutes, in addition to sale of goods, a personal service contract of delivery.\textsuperscript{288} To order specific performance of the surrogacy contract is to apply the rule that specific performance may be had when the seller refuses to deliver unique goods in conformity with his contractual obligation.\textsuperscript{289}

2. Legislative Intent of Child Selling Laws

Although laws against selling children were enacted before the technology of surrogacy developed,\textsuperscript{290} they do not exclude surrogacy from their scope. Statutes do not exempt conduct from their operation simply because the legislature could not foresee the specific manner in which the violation could occur.\textsuperscript{291} That legislators did not consciously

\textsuperscript{286} The Stern-Whitehead agreement specified that in the event of miscarriage prior to the fifth month of pregnancy, no compensation would be paid. The agreement provides for payment of $1,000 in the event the child “is miscarried, dies or is stillborn” subsequent to the fourth month of pregnancy. \textit{Baby M II}, 109 N.J. at 472 app. A, 537 A.2d at 1267 app. A.

The surrogacy agreement described by Ms. Ince provided no compensation in the event of miscarriage but required full payment to the surrogate in the event of stillbirth. \textit{See Ince, Test-Tube Women: What Future for Motherhood} 101 (1984). “Possible fine-line distinctions between a late miscarriage (no fee to surrogate) and a stillborn premature baby (full fee paid) are made by the primary physician provided by and paid for by the company.” \textit{Id.}

\textsuperscript{287} The \textit{Baby M} contract provided for payment of $1,000 in the event of loss of the baby at birth. \textit{See Baby M II}, 109 N.J. at 472 app. A, 537 A.2d at 1267 app. A. Noel Keane, the attorney who arranged the surrogacy contract between Mary Beth Whitehead and William Stern and perhaps the country’s largest dealer in surrogacy, stated that under the typical surrogate contract drafted at his office, the surrogate will receive only $3,000 if a child is delivered dead and $10,000 if a living child is delivered. \textit{60 Minutes} (CBS television broadcast, Jan. 31, 1988).

\textsuperscript{288} On the 60 Minutes interview, \textit{supra} note 287, Mr. Keane acknowledged that the surrogate contract can properly be regarded as a sale of a child, but maintained that the father’s right to the child is superior.

\textsuperscript{289} See, e.g., U.C.C. § 2-716 (1987) (“Specific performance may be decreed where the goods are unique or in other proper circumstances.”). Comment 2 to § 2-716 states that “inability to cover is strong evidence” of a proper circumstance for specific performance. \textit{See Part IV B} of this Article, \textit{infra} for a discussion of the balance to be struck in a decision whether to grant specific performance. \textit{See Robertson, Procreative Liberty, supra} note 18, at 461.

\textsuperscript{290} \textit{See Baby M I}, 217 N.J. Super. at 372, 525 A.2d at 1157; Keane, \textit{supra} note 28, at 152-54.

\textsuperscript{291} Where conduct apparently violates a statute, courts should place the burden of proving the need for an exception on the party arguing for an exception. An assertion that the legislators
address surrogacy when passing baby selling laws does not mean such laws do not apply to surrogacy. Courts must determine whether a new situation falls within the letter and intent of existing law.

Thus, a significant question in assessing surrogacy is whether the agreement to conceive, bear, and relinquish custody of a child for payment is a sale of a child. The essential elements of surrogacy appear to be (1) a preconception contract to the birth and (2) relinquishment of custody and parental rights in a child. Many commentators acknowledge that a surrogacy arrangement presents a legal rather than medical question. Because statutes prohibiting child selling create an irrebuttable presumption that being sold is contrary to any child's best interests, prosecutions for child selling do not address the best interests of the individual child. Thus, in such prosecutions, courts do not compare the two individuals involved in the commercial transfer of the child. A finding that the purchasing party would provide a better home for the child cannot overcome the prohibition. The conclusive presumption operates for the protection of children in the aggregate even if it is contrary to the best interests of an individual child.

Failure to apply traditional prohibitions against baby selling to surrogacy defeats the purposes of those traditional prohibitions. By preventing commercial transactions in humans, state statutes regulating custody and adoption promote the interests of children in the aggregate. Such statutes protect children from the perceived danger of placement in the homes of purchasers. The purpose of these statutes is were not thinking of the challenged conduct when they passed the statute does not meet this burden.

See Part II of this Article.

In their book, The Surrogate Mother, Keane and Breo state "the medical aspects [of surrogacy] are peripheral and routine." KEANE & BREQ, supra note 29, at 234. As Robertson has observed, surrogacy involves no genetic manipulation or other sophisticated medical techniques: "The only technological aid is a syringe to inseminate and a thermometer to determine when ovulation occurs." Robertson, Surrogate Mothers, supra note 5, at 32.

See supra note 272. In many states, however, the prohibition operates primarily against the intermediary or broker rather than against the individual purchaser and seller. See In re Adoption of a Child, 165 N.J. Super. 591, 398 A.2d 937 (1979).

Regarding the sale of children in general (not surrogacy in particular), Posner argues that if the price of the child is high enough, selling children would be a good thing because people generally take care of that for which they pay dearly. POSNER, ECONOMIC ANALYSIS OF LAW 114 (2d ed. 1977). The social and legislative repugnance toward child selling may evidence a judgment that the only cost sufficiently high to insure a presumption of fitness is the cost—what would be termed an "opportunity cost" by Posner—of natural conception and child birth. But accepting Posner's assertion does not advance the inquiry. Arriving at a dollar figure high enough to insure that the purchaser has invested enough to make the child product secure is impossi-
broader than the interests of any individual child who might be sold absent the prohibition. Accordingly, child selling is not merely regulated; it is flatly prohibited. Legislation against child selling not only protects living children; it also prevents creation of a class of children that would be born, or "produced" for the market.

Enforcement of a preconception contract would create the power to market children by increasing contractual security for the purchaser and depriving women of their ability to renounce contracts to relinquish children not yet born. If the sale of existing children is prohibited in part because of a fear that such sales would encourage future intentional commercial breeding, then surrogacy *a fortiori* violates the policy against child selling. Rather than distinguishing surrogacy from baby selling, the intentional nature of surrogacy enhances the need for the prohibition. Parties could hardly defend against a prosecution for baby selling that they intentionally entered into for pregnancy and sale for profit. This is precisely the danger the legislature sought to prevent when passing baby selling laws. Thus, surrogacy falls more squarely within these statutory prohibitions than does the sale of a child resulting from an unintentional pregnancy.

Surrogacy proponents maintain that statutes prohibiting child selling are intended to forbid bartering in children and to promote the concept of family. They present a narrow view of the concept of barter and a broad view of the concept of family. In addition to these policies, three other specific purposes of statutory prohibitions against child selling should be and are frequently noted: (1) protection of biological parents; (2) protection of the welfare of the child; and (3) pre-

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298 See Annas & Elias, *supra* note 3, at 221.

297 Many proponents of surrogacy distinguish surrogacy from "back-alley" sales. Yet how to distinguish between the unsavory and undesirable sale and the allowable sale is left unclear. If the buyer wears a nice suit and has clean fingernails is the sale in the best interests of the child? See, e.g., Note, *Litigation, supra* note 3, at 415. One commentator argues that surrogacy contracts promote family bonding since the child acquired may save a marriage that would otherwise fail. Traditional child selling, however, promotes the same end. And though surrogacy may strengthen the commissioning family, it is probably detrimental to the surrogate's family.
vention of exploitation of women.  

(a) Protection of Biological Parents

This purpose seems designed to increase the deference accorded the biological father who enters a surrogacy agreement to obtain a child. There is no suggestion that protection is necessary for egg or sperm donors who have no expectation of parental rights. While proponents of surrogacy maintain that the genetic relationship of the father to the child distinguishes surrogacy from the dangers of child selling, this factor cannot be required as an essential element of surrogacy.

(b) Prevention of Exploitation of the Birth Mother

Much analysis of the right to procreate focuses on the interests of infertile couples. Concern for the emotions of the infertile couple is the primary basis for protecting the procreative liberty of these individuals. Some commentators recognize yet dismiss the problems facing the surrogate mother who does not wish to relinquish the child at birth; they find protection of this interest paternalistic.

Harm to the surrogate is a real possibility, but it may not be sufficient ground for overriding contractual commitments. Although a surrogate may be able to think of the gestating fetus as the couple’s, as pregnancy continues and birth approaches, she is likely to begin regarding it as “hers.” Relinquishing the child at birth may be extremely difficult, and could lead to grief, depression and the need for counseling. Yet preventing informed women playing such partial procreative roles denies them the freedom to decide how best to fulfill their own procreative needs. If they are willing to undergo those risks, it may be unfairly paternalistic to prevent them from doing so.

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299 See Note, Litigation, supra note 3, at 426; Robertson, Procreative Liberty, supra note 18, at 424-27.

300 No commentator supporting surrogacy has suggested that the practice can be limited to those who are biologically related to the child produced. Several commentators specifically argue that a genetic relation cannot be required to enforce a surrogate contract, and the reasons for seeking surrogacy can hardly be the basis for limiting the practice. View of the rightness or wrongness of particular means of conception might properly animate individual choices to avoid, seek or provide such services. They also permit the state to refrain from funding or subsidizing this activity. But they generally do not justify public action that interferes with the exercise of the right. Robertson, Embryos, supra note 65, at 966. See also Robertson, Procreative Liberty, supra note 18, at 430. For a discussion of the essential elements of a surrogacy contract, see Part II of this Article.

301 Robertson, Embryos, supra note 65, at 1014. The hard question is not whether society should prevent a woman from being a surrogate, but, rather, who bears the risk of breaching the surrogacy contract by refusing to relinquish the child. For thorough personal accounts of the expe-
Whether harm to one of the parties to a contract is sufficient to override an express contractual obligation and prevent enforcement of the obligation depends on the benefits and risks of the contract. To the contracting parent or parents, the primary benefit of surrogacy is the emotional and psychological fulfillment of having a child to love and raise. Fairness demands, however, that society give like consideration to the emotional effects on the other party—the surrogate.

The typical setting for baby selling involves an unintentional pregnancy of an unwed mother, who is contacted by a couple or individual wanting to adopt the child and willing to pay for the child. By contrast, the surrogate contract involves an intentional pregnancy. Thus, proponents maintain, the surrogate needs no protection since she was not at the mercy of the other party at the time of the pregnancy. She made a free choice to become pregnant. While the unwed, unintentionally pregnant mother is one victim of the traditional black market for children, the better bargaining position of the surrogate—assuming it is a reality—does not neutralize the dangers addressed by legislation. Little evidence suggests that surrogacy alleviates the danger of coercion; potential for coercion of women into surrogacy is real. Financial need has pushed many women into sexual prostitution. More women may consider surrogacy because both the media and surrogacy brokers emphasize the altruistic motivation of surrogates. Proponents depict mothers consenting to adoption differently from surrogate mothers to justify applying different rules to each. They portray the mother consenting to adoption as unique in acting under stress of both financial and social pressures. But the situations of these mothers are more alike than different. While the surrogate mother does not become pregnant accidentally, her decision to bear a child for others often results from financial pressures. To conclude that because the surrogate mother is not pregnant at the time she enters the contract, she is free of stress or emotional pressures makes no sense and fosters distorted stereotypes. For the nonsurrogate mother considering adoption, financial


To find credence in this argument, one must believe that the legislature's primary concern in baby selling statutes was that the selling mother would be taken advantage of in the bargain. See A Special Lady (video produced by N. Keane). See also INCE, supra note 286, at 102, 112.

stress exists both before and after delivery. But nothing in the policy requiring an existing child for an adoption contract alleviates these financial pressures. The only factor that cannot be assessed before birth is the emotional relationship with her child—her living child. Similarly, the surrogate can weigh economic stresses before birth, but she cannot assess her relationship to the child until after the child is born.

According to many commentators, to date the typical surrogate has been married and is the mother of one or more children prior to the surrogacy contract. A woman who has had the experience of childbirth and who has children and a husband in her home may be deemed marginally more capable of judging her own ability to surrender a child willingly. But these characteristics may not describe future surrogates, especially if surrogacy becomes an enforceable reproductive option. Because of the current uncertainty in surrogacy arrangements, surrogacy brokers have probably chosen surrogates with care in order to maximize both the probability of winning a judicial enforcement and also the odds of the surrogate's performing without judicial intervention. If courts enforce surrogate contracts, however, the need for caution in choosing a surrogate will diminish. Like the black market purveyor of infants, the surrogate broker, who is motivated by profit, can be expected to procure mothers where he or she finds them at the lowest rate of pay. If they are young and unmarried, yet available, the profile of the typical surrogate mother will change. Some commentators have suggested that legislation can set the perimeters of the surrogate relationship on the basis that factors such as marital status and

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806 Every state protects this decision, which the mother alone can make, by prohibiting prebirth contracts for adoption.

807 At this point, the category of surrogates constitutes too small a sample of potential surrogates to provide a reliable generalization. Whether these women represent the women who will be drawn to surrogacy if it is declared legal is doubtful.

808 See Elster, supra note 124, at 1. A woman's capacity for willing surrender of her child pursuant to a surrogacy agreement depends on many psychological factors. A few might include the ability to control emotions, the ability to act contrary to feelings, and the ability to make significant life choices without sentiment or emotion. One might speculate that the women who could best serve as surrogates with the least emotional trauma may have harnessed a psychological mindset that would reduce the probability that they would be in a financial predicament that would make them consider surrogacy.

809 See Baby M II, 109 N.J. at 438-40, 537 A.2d at 1248-49.

808 If market forces make other women more available or available at a lower rate of pay, the surrogate broker will give less consideration to the surrogate's characteristics that predict her ability to keep her promise. Of course, if courts refuse to enforce contracts with surrogates who are notably young or single or without children, incentives to contract with married surrogates will continue.
children in the home protect women. But, the proper role of legislation is problematic. Any regulation would involve government intrusion in an arena recognized as private and would involve serious equal protection problems. Accordingly, one should view with skepticism the response to objections to surrogacy that legislation will take care of the details.

In this transaction the potential that the seller will regret the promise to sell is far greater than in other sales. The emotional well being of the surrogate is at risk in any surrogacy contract. This risk should not be dismissed as unrealistic or unworthy of protection.

(c) Protection of the Child

Because children cannot protect their own interests, this category should be given special weight. Whether the children are extant or yet to be born, conceived by accident or by design, their interest as a group is central to any sound policy regarding their sale. Current statutes in most states prohibit payment for a child. Previously, this prohibition has not encompassed children born as a result of surrogacy contracts, such contracts being unknown.

Viewed from the narrow perspective of the individual child already born as a result of a surrogacy agreement, the interests of the child might seem to be served best by placement with the commissioning party. Of course, the same is true of an outright sale. Typically, the commissioning or purchasing parents can provide a financially secure home. By contrast, the surrogate’s family is likely to be financially disadvantaged. (Financial problems may have spurred the woman’s decision to become a surrogate.) Additionally, the surrogate’s decision to bear a child for another will often cause emotional turmoil for her family. Some writers argue that surrogacy is in the best interests of the child because the life of this particular child would not exist but for the surrogacy arrangement.

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310 If the state sanctions surrogacy, equal protection considerations will significantly circumscribe the state’s power to dictate the particulars of the arrangement.


312 See, e.g., Baby M I, 217 N.J. Super. at 354-55, 525 A.2d at 1148. The New Jersey Supreme Court also noted that a lower income woman would hardly hire an upper income woman to be her surrogate. Baby M II, 109 N.J. at 440, 537 A.2d at 1249.

313 See Robertson, Surrogate Mothers, supra note 5, at 29; Eaton, Contract Consistent with Public Policy, 119 N.J.L.J. 328, 399 (1987). This argument also applies when a pregnancy was entered for the purpose of an outright sale.
The broader and more appropriate inquiry, however, is whether the policy against child selling is intended to protect existing children only or all children including those yet to be born. Four possible categories of transfers of children merit consideration: (1) the child born as a result of an *accidental* pregnancy and sold to a stranger; (2) the child born as a result of an *intentional* pregnancy and sold to a stranger; (3) the child born as a result of an *intentional* pregnancy pursuant to a preconception contract and genetically related to the contracting party; and (4) a child born as a result of a preconception contract but not related to the contracting party.

The first category is the typical case clearly prohibited by the law against baby selling. The second category is not typical, but would clearly be prohibited. It is a sale. The result of this conduct would be the same as allowing sales in the first category. One of the dangers prohibition of sale of babies prevents is the sanction and creation of the business of making babies. Proponents of surrogacy propose the final two categories for exclusion from laws against baby selling. The third category is the typical surrogate contract. The fourth category is not currently typical but is probably not distinguishable on any principled basis. The only difference between the first two categories and the final two is the preconception agreement to bear the child. Some states may find that as a matter of public policy, this distinction is sufficient to protect children because persons posing a risk to children would not be willing to wait the necessary nine months for a child. Such states may also find that public policy is not offended by recognition of parental status in the commissioning party.

Categories two and four are substantially the same: each creates commerce in children. The production of children for money appears to be precisely the harm that legislation against baby selling is meant to prevent. If the dangers to individual children—as opposed to children in the aggregate—were the only concern, then the regulation suggested in the surrogacy context should serve for all four categories. The logic of proponents of surrogacy supports a policy that allows but regulates child selling so that individuals deemed likely to be desirable parents can obtain children by purchase. But legislatures have categorically rejected regulated child selling as a way of meeting the needs of the infertile. Obviously, the needs of existing individual children to be sold is

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914 Because the agreement is before conception, the proponents can assert that the contract is for a personal service rather than for sale of goods.
not the sole concern of such legislation. Rather, child selling legislation is based on the broader principle that the production of children for money is an activity that harms all involved, including society. The greatest long run effect of legalization of surrogate contracts is the same effect of the legalization of the sale of children: the production of children for money.\textsuperscript{318}

B. Comparison to Prebirth Consent to Adoption

The prohibition against recognition of prebirth consent to adoption of a child also serves the public policy against creating a market in children. In \textit{Baby M}, the New Jersey Supreme Court held that the irrevocable nature of the promise to relinquish a child violated public policy and constituted an independent reason for invalidating the contract, even if the contract made no promise to pay for the child.\textsuperscript{316}

The policy behind the caution that all states require for termination of parental authority is longstanding. The underlying societal judgment includes recognition of the different regard our society holds for unborn children versus living children.\textsuperscript{317} Indeed, the conceptional difference between a living child and an unconceived child may be the reason our society has afforded any credence to commercial surrogacy as a reproductive option. Before children are conceived, they are often treated like fungible goods. Couples opt for more vacations, a larger house, or buying additional things in preference to having another child. It is common to hear people speak of their decision not to have more children in order to finance better educational opportunities and other benefits to the children already within the family. It would be unusual, however, for a couple to state that they decided to have more children in order to sell them to provide these same benefits for their elder children. Both courts and legislatures have struck down prebirth agreements in order to protect the family as an institution, as well as the individual parent and child from the inability to appreciate fully

\textsuperscript{318}This judgment contradicts the assertion by Landes and Posner that the greatest long run effect of baby selling would be the reduced number of abortions used to terminate unintentional pregnancies. See Landes & Posner, supra note 36, at 342-46.

\textsuperscript{316}See \textit{Baby M II}, 109 N.J. at 435-36, 537 A.2d at 1247.

\textsuperscript{317}The decision in \textit{Roe v. Wade} relied on this difference in perception of the living and the unborn. 410 U.S. 113 (1978). The important considerations sufficient to allow a woman to decide to abort a fetus are clearly insufficient to justify killing the child once it is born. Prior to viability, the interests of the fetus are minimal in comparison with those of the mother. Further evidence of our disregard for the interests of the fetus is the rejection of a claim for wrongful death of a viable fetus. See, e.g., Milton v. Cary Medical Center, 538 A.2d 252 (Me. 1988).
the important place a child holds once it is born.318

The decision to recognize the commissioning father's right to a commercial contract for a child is a judgment that the benefits of overcoming infertility or avoiding the inconvenience of childbirth outweigh the costs of the arrangement. Such costs include the financial costs attending dispute resolution in courts or through arbitration, the emotional costs to the mother who is unable to surrender her child willingly, and the risk of loss to the commissioning party.

Analyses of the benefits and detriments of surrogacy have yet to explore the difference in the quality of the compared needs. The situation of the infertile couple is heartrending. If the emptiness of infertility is termed a "loss," it is the loss of a child "in general." But the loss risked by all parties to surrogacy is the loss of a particular, unique, and identifiable child. Such a loss is different in quality from the loss created by childlessness.

The Sterns no longer want a child; they want this particular child, Melissa. In Baby M the trial court justified enforcement of the contract on this basis despite the equally heavy burden such enforcement placed on the mother. Viewed from a perspective of public policy, however, this fact argues for rejection of the surrogacy arrangement as too costly. The loss of the particular child is a cost present in every surrogacy contract. This loss will fall either to the commissioning party or to the mother who loses the custody dispute. Even when the mother delivers her child and relinquishes parental rights as promised, she will experience psychological pain.319

318 Professor Russell Coombs criticized portions of the New Jersey Supreme Court opinion in Baby M II as sexist.

[T]he Court states that, since a woman agrees to become a surrogate 'before she knows the strength of her bond with her child' she never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed. Even a woman who, like Mrs. Whitehead, has borne and raised other children is deemed so lacking in information and will that 'no amount of advice would satisfy the potential mother's need.' This view of women's incapacities is reflected also in other language in the opinion.

Coombs, Sexual Stereotypes Clutter Ruling, 121 N.J.L.J. 320 (1988). Rather than expressing sexism, however, the New Jersey Supreme Court may be recognizing all parents' inability to experience natural attachment to their children until they are born. The limits on consent to adoption prior to birth and the court's rejection of surrogacy because of the irrevocability of the promise to relinquish are consistent with the long held presumption of the common law: No parent—male or female—is able to fully appreciate and knowingly renounce parenthood of this particular child prior to that child's birth.

319 Even Noel Keene's video, A Special Lady, notes that the surrogate is likely to feel regret
Some commentators reject the balancing of losses or psychological risks as paternalistic. It is no more paternalistic, however, than the decision to enforce a surrogacy contract in order to protect the emotional interests (not the property rights) of the commissioning party. Our society restricts many individual freedoms to promote greater long term freedoms. For example, it may be paternalistic to deny individuals the right to take drugs or to choose to sell themselves into slavery. But such restrictions enhance long term freedoms of both the individuals whose choice is restricted and society as a whole.

Surrogacy increases losses to society as a whole by creating a particular child that one party or the other will lose. The above cost-balancing comparison of the pain risked in surrogacy contracts argues for a policy that discourages such contracts. According to Professor Radin, this comparison is itself flawed. Such balancing represents an acceptance of quantification of human emotions. The market model is inappropriate for normative judgments regarding fundamentally personal rights as opposed to property rights. In Radin's terms, commercial surrogacy should be rejected not because of a balance of pain and benefit but because of the larger effect of such an arrangement on our perceptions of our society and ourselves.

C. Commodification

Judge Richard Posner applied the concept of economic efficiency to child custody and, while not discussing surrogacy per se, advanced the argument that the sale of babies should be legal. His arguments apply to commercial surrogacy. Posner stated that "willingness to pay is a generally reliable, although not infallible index of value, and the
parents who value a child most are likely to give it the most care.\textsuperscript{324} However, an assessment of the emotional costs to all parties in baby marketing—including the dangers to the living and to the yet unborn—reveals losses not found in most commercial markets. Can the seller opt for economic breach when a better offer comes along? How is the danger of emotional harm to the original purchaser to be evaluated or compensated in the event of an economic breach by the seller? Like pain and suffering, the loss of a child can be categorized as an economic loss for which there is no market: “A cannot buy B’s ears and tongue to gratify his taste for mutilating people and therefore these things do not have prices. But they have opportunity costs.”\textsuperscript{328} The lack of a market for suffering notwithstanding, a figure for the loss can be set.

The usual context for such costs is the assessment of damages in personal injury actions. There appears to be no reason to refuse to quantify the unquantifiable pain and suffering of the victim in this context. The \textit{process} does not create the loss or the pain. The process compensates the victim in the only way it can. The court cannot give back the severed ear, but it can give money damages in compensation. Furthermore, the pain quantified for compensating a victim of personal injury is useful in “reducing the incentives to avoid inflicting [suffering].”\textsuperscript{326} This does not mean that a defendant could purchase a victim’s ear. A significant difference exists, however, in the context of surrogacy contracts. Placing a price on a child by contracting either for a child or for parental rights and custody serves no compensatory purpose. Unlike personal injury recoveries, quantification in this context justifies the imposition of suffering, thereby heightening the risk of more suffering by increasing the likelihood of future surrogacy arrangements. The likelihood that regret and pain will fall on either the breaching mother or on the commissioning father is very real. Rather than resolving the problems of infertility, surrogacy will create new formidable problems with costs so great that both courts and economists should recoil from the prospect.

\textbf{VII. CONCLUSION}

Our repugnance toward child selling bespeaks not only our general

\textsuperscript{324} Posner, \textit{Economic Analysis of Law} 114 (2d ed. 1977).
\textsuperscript{326} Id. at 149.
\textsuperscript{328} Id.
regard for the sanctity of life but also our shared belief that the best interests of a child are not served by a parent unwilling to endure the inconvenience of childbirth. But many persons who are involuntarily childless would willingly endure this pain and would make exemplary parents. The inability to become parents is a tragedy. The involuntarily childless have always been present in this and other societies. Our society has never deemed their needs sufficient to justify the dangers of marketing children, regardless of their ability or inability to secure children by adoption, however. The interest surrogacy seeks to serve is the same interest that would be served by the sale of children. Thus, the nature of the practices themselves rather than the interests served must justify any distinction between the two practices.

Whether surrogacy will survive as a reproductive option depends on our judgment as a society of the essential nature of the arrangement. If it is in essence a sale of a child, the prohibitions against sale should apply to protect these children as well as living children. All agree that the interests of children are the paramount consideration. But how best to serve those interests is a difficult question.

The belief that preservation of the parent-child relationship is in the child’s best interests has profoundly influenced child custody law. It has created a judicial preference for the legal parent of a child. Until now, the issue of parenthood has not presented significant conceptual controversy. Genetic parents were deemed the parents of a child and thus entitled to a preference when in dispute with a nonparent. But in surrogacy the issue of parental status is problematic. If the commissioning party does not have parental status, he or she will prevail in a custody dispute only upon a showing that the parent is unfit, or that the presumption favoring the parent is overcome. In some cases the commissioning party is the genetic parent of the child. It is doubtful, however, that the genetic relationship can be required as an element of surrogacy as a constitutional matter. This article has explored three possible bases for deeming the commissioning party the “legal parent” of the child born as a result of a surrogacy contract: (1) the contract; (2) the federal constitution; and (3) future legislation or judicial determinations authorizing surrogacy or parental status based on surrogacy.

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Problems exist with each of these bases.

The contractual declaration is ineffective if it violates public policy. The New Jersey Supreme Court found that the contract of commercial surrogacy does violate public policy both because of the transfer of consideration and because of the irrevocability of the transfer.

Even a genetic relationship appears to be an insufficient link to require recognition of parental status. The United States Supreme Court has evaluated the genetic relationship in the context of parental rights in illegitimate children and held it insufficient to confer parental status absent some definite act by the father showing a relationship of responsibility toward the child. Whether a commercial transaction (an illegal contract according to the decisions of some states) should be deemed an acceptable manifestation of responsibility any more than a fraudulent or coercive contract will undoubtedly be the subject of significant debate. From the perspective of constitutional rights, such a contract has little more justification than does a coercive contract.

The final basis for determining parental status of the commissioning party is a decision by the state—made either by the judiciary or by the legislature—that such recognition of parental status serves the public interest. At first blush, this appears to have influenced the New Jersey Supreme Court's decision in *Baby M*. The supreme court, however, assumed that the Uniform Parentage Act adopted by New Jersey granted parental status to all genetic parents regardless of how that genetic relationship arose. It did not directly address the question of whether granting the commissioning party parental status furthers or threatens the state's public policy.

Surrogacy presents a clash of two fundamental legal concepts: (1) the right of natural parents to the companionship of their children; and (2) the right of society to prohibit commercial transactions in children. Because these concepts never competed before the advent of surrogacy, their clash now occurs against a backdrop of laws designed to further both concepts. Laws preventing termination of parental rights without due process and a compelling state interest serve the first concept. Laws preventing the sale of one's children limit the rights of parents and further the second concept. In sum, society rejects the right of individuals to terminate the relationship of parent and child through a commercial transaction. Commercial surrogacy furthers the first concept, but it violates the second. It achieves a genetic relationship of parent and child through an economic rather than personal relationship.
between the biological parents. Proponents of surrogacy don’t resolve this discord; they merely deny its significance. They argue that one cannot purchase what is already his.\textsuperscript{328}

If the policy against economic transactions in children is a serious one, however, it should be enforced by prohibitions against both the sale and purchase of one’s children. Courts and legislatures should openly acknowledge that parental status in surrogacy depends on public policy. To apply the best interests test to the infant born of surrogacy without assessing parental status makes no sense, since parental status often governs the custody decision. Until the question of parental status in commercial surrogacy is confronted directly as a public policy choice and resolved, the best interests test cannot protect those most in need of its protection: those born and yet to be born of surrogacy.

\textsuperscript{328} See Baby M I, 217 N.J. Super. at 372, 525 A.2d at 1152.